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No. 13310

United States
Court of Appeals
for the Ninth Circuit.

See vols. 2747-8

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GEORGE W. REED and INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL No. 36, AFL,

Respondents.

Transcript of Record

Petition for Enforcement of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13310

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Counsel for Respondent, E. C. Charlton.

United States of America
Before the National Labor Relations Board

Twentieth Region

Case No. 20-CA-268

In the Matter of

GEORGE W. REED

and

ERNEST SYDNEY CHARLTON, an Individual.

Case No. 20-CB-80

In the Matter of

INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION OF AMERICA, LOCAL No. 36, AFL,

and

ERNEST SYDNEY CHARLTON, an Individual.

COMPLAINT

It having been charged by Ernest Sydney Charlton, an individual, that George W. Reed, an individual, herein called Respondent Reed, and International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, herein called Respondent Union, have engaged in, and are engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C.A. 141 et seq. (Supp. July, 1947), herein called the Act, the General Counsel for the National Labor Relations

Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board, Series 5, as Amended, Section 203.15, hereby issues his Complaint upon the charges, duly consolidated, pursuant to the provisions of Section 203.33(b) of the above Rules and Regulations, and alleges as follows:

I.

The Respondent Reed is, and at all times herein mentioned, has been an individual, doing business as a licensed masonry contractor, with his business office in San Francisco, California.

II.

In the course and conduct of his business, Respondent Reed performs, and at all times material herein has performed, work as a masonry contractor on construction projects in the State of California to which substantial amounts of materials are sold, shipped, delivered, and transported in interstate commerce from points outside the State of California.

III.

International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

IV.

Sometime in May, 1949, Ernest Sydney Charlton was employed to work as a hod carrier for Respond-

ent Reed on an apartment housing project known as Stonestown in San Francisco, California, on which project Respondent Reed was a subcontractor responsible for masonry work, and Charlton continued in said employment until on or about June 14, 1949.

V.

On or about June 14, 1949, Respondent Reed, by his agents, officers and employees, discharged the aforesaid Charlton upon the request and demand of Respondent Union because said Respondent Reed had been advised that said Charlton was not in good standing as a member of said Respondent Union in that said Charlton had failed to obtain clearance from Respondent Union before reporting to work.

VI.

Respondent Reed, by the acts set forth in paragraph V above, did discriminate and is now discriminating in regard to hire and tenure of employment and terms and conditions of employment of Ernest Sydney Charlton, and did encourage and is encouraging membership in, or adherence to a labor organization, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

VIII.

By the acts set forth in paragraph V above, the Respondent Reed did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights

guaranteed them in Section 7 of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (a) (1) (A) of the Act.

VIII.

On or about June 14, 1949, Respondent Union, by its officers, agents and employees, did cause Respondent Reed to discharge Ernest Sydney Charlton because of his alleged failure to maintain membership in good standing in Respondent Union in that said Charlton had failed to obtain clearance from the Respondent Union before reporting to work.

IX.

By the acts set forth in paragraph VIII above, the Respondent Union did cause Respondent Reed to discriminate against an employee in violation of Section 8 (a) (3) and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

X.

By the acts set forth in paragraph IX above, the Respondent Union did interfere with, restrain and coerce, and is interfering with, restraining and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

XI.

The acts of the Respondent Reed and Respondent Union set forth in paragraphs V and VIII above, occurring in connection with the operations of the employer as set forth in paragraphs I and II above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

XII.

The acts of Respondent Reed as set forth in paragraph V above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and 8 (a) (3), and Section 2 (6) and 2 (7) of the Act.

The acts of Respondent Union as set forth in paragraph VIII above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and 8 (b) (2), and Section 2 (6) and 2 (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, on this 12th day of May, 1950, issues his Complaint against George W. Reed and International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, respondents herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director, National Labor Relations Board.

[Received in evidence July 5, 1950, as General Counsel's Exhibit No. 1-C.]

United States of America
Before the National Labor Relations Board

Twentieth Region

[Title of Causes.]

ANSWER OF RESPONDENT INTERNATIONAL HODCARRIERS, BUILDING & COMMON LABORERS UNION OF AMERICA, LOCAL No. 36, AFL

Comes now the Respondent Union, International Hodcarriers, Building & Common Laborers Union of America, Local No. 36, AFL, and severing from his Co-Respondents, answers the complaint on file herein as follows:

I.

Respondent Union denies the allegations of Paragraphs V, VI, VII, VIII, IX, X, XI, and XII of said consolidated complaint.

II.

The Respondent Union having no information or belief upon the allegations mentioned in Paragraph II of said consolidated complaint sufficient to enable him to answer the allegation therein, places his denial on that ground denies each and every allegation set forth in said Paragraph II.

Wherefore, Respondent Union prays that said consolidated complaint be dismissed.

Dated June 28, 1950.

/s/ WATSON A. GARONI,
Attorney for Respondent
Union.

Duly verified.

Received June 28, 1950.

[Received in evidence July 5, 1950, as General Counsel's Exhibit No. 1-J.]

[Title of Causes.]

ANSWER OF RESPONDENT GEORGE W. REED

Respondent George W. Reed hereby answers the complaint on file herein as follows:

I.

Respondent admits the allegations contained in paragraph I of said complaint.

II.

Answering the allegations contained in paragraph II of said complaint, Respondent admits that in the course and conduct of his business, he performs, and at all times material herein has performed, work as a masonry contractor on construction projects in the State of California to which materials are sold, shipped, delivered, and transported in interstate commerce from points outside the State of Califor-

nia. He is without knowledge as to the amounts of material so sold, shipped, delivered, and transported to said projects and does not know whether said amounts are to be deemed "substantial" with relation to the total amounts of materials sold, shipped, delivered and transported to said projects. In this connection, he avers that during the calendar year 1949 his gross business amounted to approximately $480,000, of which amount approximately $80,000 represents purchases of building materials and supplies. Less than 3% of this amount of $80,000 represented materials and supplies originating from points outside of the State of California.

III.

Respondent admits the allegations contained in paragraphs III and IV of said complaint.

IV.

Answering the allegations contained in paragraph V of said complaint, Respondent avers that on June 14, 1949, his foreman laid off Ernest Sydney Charlton upon the request and demand of the business agent of Respondent Union. He denies that such lay off was for the reason that he had been advised that said Charlton was not in good standing as a member of said Respondent Union, and in this connection, he alleges that said layoff was for the sole reason that said business agent threatened at said time and place, that unless said Charlton left the project, said business agent would cause all other hod carriers working on said project to leave the project immediately.

V.

Respondent Reed denies each and very one of the allegations contained in paragraphs VI and VII of said complaint.

VI.

In answer to the allegations contained in paragraphs VIII, IX and X of said complaint, Respondent avers that he is without knowledge as to the reason why the business agent of Respondent Union demanded that his foreman remove Ernest Sydney Charlton from said project under penalty of the removal of all other hod carriers from the project if said Charlton were not removed. He denies that Respondent Union caused him to discriminate against an employee in violation of Section 8 (a) (3) of the Act.

VII.

In answer to the allegations contained in paragraph XI of said complaint, Respondent denies that the act of laying off said Charlton, as hereinabove averred, had a close, intimate and substantial relation to trade, traffic, and commerce among the several states or that said act had a tendency to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. In this connection, Respondent alleges that said act had only a very remote and insubstantial effect on commerce, if any, and that it would not effectuate the policy of the Act for the National Labor Relations Board to assert jurisdiction in the instant proceeding.

VIII.

Respondent denies each and every one of the allegations contained in paragraph XII of said complaint.

Wherefore, Respondent prays that said complaint be dismissed.

Dated June 30, 1950.

GARDINER JOHNSON,

THOMAS E. STANTON, JR.,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Respondent,
George W. Reed.

Duly verified.

Received July 3, 1950.

[Received in evidence July 5, 1950, as General Counsel's Exhibit No. 1-K.]

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

[Title of Causes.]

BENJAMIN B. LAW, ESQ.,
For the General Counsel.

THOMAS E. STANTON, JR., ESQ.,
Of San Francisco, Calif.,
For the Respondent Reed.

WATSON A. GARONI, ESQ.,
Of San Francisco, Calif.,
For Respondent Union.

GORDON W. MALLATRATT, ESQ.,
Of San Francisco, Calif.,
For Ernest Sydney Charlton, an Individual.

Before: Ward, Trial Examiner.

INTERMEDIATE REPORT

Statement of the Case

Upon separate charges duly filed on July 6, 1949, by Ernest Sydney Charlton, herein called Charlton or the Claimant, the General Counsel[1] by

[1]The General Counsel and his representative at the hearing are herein called General Counsel; the National Labor Relations Board is herein called the Board.

the Regional Director for the Twentieth Region (San Francisco, California), issued a complaint dated May 12, 1950,[2] against George W. Reed, herein called Respondent Reed or Reed, and against International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, herein called Respondent Union, the Union, or Local No. 36, alleging that Respondent Reed had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act; and that the Respondent Union had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and 8 (b) (2), and Section 2 (6) and (7) of the Act.

On July 7, 1949, the Regional Director caused a copy of the original charge to be served on both Respondents; and on May 12, 1950, caused the order consolidating cases, notice of consolidated hearing, complaint, and charges to be served on both Respondents and the charging party, Charlton.

With respect to the unfair labor practices, the complaint alleged in substance that: (1) During May, 1949, Respondent Reed employed Charlton to work for him as a hod carrier on an apartment housing project known as Stonestown, on which

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[2]On this same day, the said Regional Director, pursuant to Section 203.33 of the Board's Rules and Regulations, issued an order consolidating the above-numbered cases for hearing.

project Respondent Reed was a subcontractor responsible for certain masonry work; (2) on or about June 14, 1949, Respondent Union, by its officers, agents, and employees demanded that Respondent Reed discharge said Charlton because he was not in good standing as a member of Respondent Union in that said Charlton had failed to obtain clearance from Respondent Union before reporting to work for Reed; (3) on or about June 14, 1949, Respondent Reed, by his agents, officers, and employees, discharged the aforesaid Charlton pursuant to the request and demand of Respondent Union for the reason that Respondent Reed had been advised that said Charlton was not in good standing as a member of Respondent Union in that he failed to obtain clearance from Respondent Union before reporting to work for Reed; and (4) that by the acts described above Respondent Reed and Respondent Union, and each of said Respondents restrained and coerced Charlton in the exercise of the rights guaranteed in Section 7 of the Act.

On June 28, 1950, Respondent Union filed its answer to the complaint wherein it denied any knowledge that Reed was engaged in interstate commerce; and generally denied all allegations of the complaint.

On July 3, 1950, Respondent Reed filed his answer to the complaint in which he admitted that in the course and conduct of his business at all times material herein he performed work as a masonry contractor in construction of projects in the State of California to which material was sold, shipped,

delivered, and transported in interstate commerce from points outside the State of California.

He alleged, however, that he was without knowledge as to the "amounts" so sold, shipped, delivered, and transported to such projects, and does know whether said amounts "are to be deemed 'substantial'" with relation to the total amounts of materials sold, shipped, delivered, and transported to said projects;[3] and that, in any event, it would not effectuate the policies of the Act for the Board to assert jurisdiction herein.

Pursuant to due notice, a hearing was held at San Francisco, California, on July 5, 6, and 7, 1950, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, both Respondents, and Claimant Charlton were represented by counsel. All[4] participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. At the close of the hearing the parties were afforded an opportunity to and did argue orally, upon the record, before the undersigned. The parties were further advised that they might file briefs and/or proposed findings of fact and conclusions of law with the undersigned. Briefs were filed by the General Counsel and by counsel for both Re-

[3]Reed's version of the reason for Charlton's termination as an employee, as set forth in his answer, is quoted below.

[4]Counsel for Charlton did not participate in the examination of witnesses, but at all times counseled with the General Counsel.

spondents and have been duly considered by the undersigned.

After the taking of evidence, the undersigned granted the General Counsel's motion to conform the pleadings to the proof in formal matters, and reserved ruling on Respondents' motion to dismiss the complaint and to strike General Counsel's Exhibit No. 3.[5] The motion to dismiss the complaint is disposed of in accordance with the findings of fact, conclusions of law and recommendations made below.

Upon the entire record in the case and from his observation of witnesses, the undersigned makes the following:

Findings of Fact

1. Commerce; the business of Respondent Reed

Respondent Reed is, and, for at least 9 years past, has been engaged in business as a masonry contractor in the San Francisco Bay Area of northern California. During the 9-year period above referred to Reed has been a member of Masons and Builders Association of California, Inc., an association composed of some 40 employers engaged in masonry, contracting, and related construction activities in northern California.

The association has, during several years past, had collective bargaining contracts with Respondent Union, covering hod carriers employed by mem-

[5]The undersigned makes no finding based upon this exhibit, but retains it in the records merely as background material.

bers of such association including Respondent Reed. The said contracts have been on a multiple basis through the association.[6] Reed testified and the record discloses that, with minor exceptions, all of his contracts for masonry work are subcontracts made with general contractors. At the time of the hearing herein Reed employed 15 bricklayers and 10 hod carriers, which members were, according to Reed's testimony, below his general average. The materials ordinarily used by Reed consist mostly of brick, mortar (lime and cement), some tile, terra cotta, glazed tile units, small tools, mortar mixers, and wheelbarrows.

At the time of the termination of Charlton on June 14, 1949, by Reed, the latter was engaged in completing a subcontract valued at $110,239, for building boiler room chimneys, garages, flower boxes, and trimmings at the Stonestown project,[7] work on which contract had been started in 1948, when some 70 per cent of the work required to be done by Reed had been completed. Since Reed's performance of his subcontract on the Stonestown project began in 1948, the undersigned deems it advisable to consider in some detail Reed's activities in 1948 as well as in 1949.

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[6]The above findings are based upon a stipulation of the parties. The stipulation as first agreed to, recited that contracts included the period of June 14, 1949 (the date of Charlton's termination), but was later modified by striking the words "including the period of June 14, 1949," from such stipulation.

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[7]This project is described and referred to in greater detail below.

Reed's 1948 Activities

Reed did not recall the gross value of his operations for 1948 in terms of dollars. He did, however, refer to certain building projects upon which he had subcontracts for masonry work, as follows:

The Pacific Telephone and Telegraph Company,[8] San Francisco, California, for masonry work on a telephone exchange building performed by Reed at the agreed price of $148,000. The construction work done under Reed's contract took approximately 6 months.

The Pacific Gas and Electric Company,[9] San Francisco, California, masonry work performed on a substation, an operation lasting about 3 months. Contract price $60,000.[10]

David Bohannon Company, Inc., owner and general contractor of a project consisting of some 300 to 400 small 1-family dwellings at San Lorenzo, California. Under 2 or 3 "small contractors" Reed erected "three or four hundred" fireplaces and chimneys of "the aggregate value of" around twenty-five or thirty thousand dollars.

Reed testified that he had many jobs around

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[8]Heretofore found by the Board to be engaged in commerce within the meaning of the Act. 74 NLRB 536.

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[9]Heretofore found by the Board to be engaged in commerce under the Act. 87 NLRB 257.

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[10]Reed testified the amount may have been as high as $63,000, "some place in there."

$1,000 up to $5,000 during 1948, but did not recall them, as "taking (sic) back two years it's hard to put your finger on them."

Reed's 1949 Activities

Reed's masonry subcontracts for 1949 for both commerical and residential projects grossed $481-869.25.

One of the major projects was The Pacific Telephone and Telegraph Company, for whom Reed had a subcontract for masonry work on a telephone exchange in 1948, let a further construction contract in 1949. Reed's subcontract for the 1949 job covered masonry and related work on a new 9- to 10-story building, used in part as an office building and in part as a telephone exchange. The value of Reed's 1949 contract was $150,000.[11]

Standard Oil Company of California[12] about mid-year 1948 began the construction of a 22-story office building adjacent to the "present home office building at 225 Bush Street," in San Francisco, California; the approximate cost of the entire addition or building is $6,000,000; and was approximately 90 per cent complete in July, 1950. The new building is basically a steel structure with concrete walls, floors, and with a terra cotta indented fairway on

[11]The parties stipulated that The Pacific Telephone and Telegraph Company and The Pacific Gas and Electric Company are public utilities with their main offices in San Francisco, California.

[12]Heretofore found to be engaged in commerce within the meaning of the Act. 79 NLRB 1066.

the outside. Slightly under $900,000 worth of steel went into the structure; none of which steel was fabricated in the State of California, but was fabricated in "the east," that is to say, "east of the Mississippi."[13]

Reed's contract with The Standard Oil Company of California covered masonry and related work and provided for the payment to Reed of approximately $200,000.[14]

At the time Reed terminated Charlton on June 14, 1949, the former was completing a subcontract valued at $110,239, which covered the building brick boiler room chimneys, garages, flower boxes, and trimming at the Stonestown project.[15]

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[13]The record discloses without dispute that six Otis elevators installed in this new addition were manufactured in New York and New Jersey. The price or value of such elevators was not disclosed on the record.

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[14]The findings with reference to The Standard Oil Company of California's additional office building (other than Reed's subcontract thereon), is based on the credited testimony of E. P. Wright, manager of the building design construction department for said Standard Oil Company.

---

[15]Stonestown project is an apartment and commercial development being erected by Stonestown Development Corporation, as developer and general contractor. When completed, the project will have 683 apartments of 1, 2, and 3 bedrooms and a commercial area. The apartments were over 90 per cent completed in July, 1950. Construction of the commercial area was just beginning in July, 1950. While W. Boyd Stewart, secretary of Stonestown

The record discloses that J. H. Pomery and Co., sold approximately $300,000 worth of lumber to Stoneson; that the lumber was shipped to San Francisco from northern California and southern Oregon; that some of the timber cut in California was processed in Oregon mills; and that 60 per cent of the total lumber so sold and delivered by Pomeroy Company came from Oregon, and the balance, or 40 per cent, came from northern California. Thus $180,000 worth of the lumber was shipped in interstate commerce.[16]

The record further discloses that L. J. Kruse Company of Oakland, California, contracted with Stoneson to furnish heating and plumbing equipment consisting of sanitary facilities, boilers, heaters, and labor of installation of such equipment for the sum of approximately $780,000. Edward H.

Development Corporation, testified that it was estimated that Stonestown project, when completed, would cost $10,000,000, he conceded upon cross-examination that contracts on the project completed to date of the hearing amounted to but $3,688,000. The undersigned does not find that this latter figure denotes the value of improvements actually made on Stonestown project, but is of the opinion that it represents the approximate value of contracts for certain improvements made or to be made on the project.

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[16]Donald Whittemore, office manager for Pomeroy, testified that practically all of the lumber contracted for had been delivered, but could not say that it had all been so delivered by June 14, 1950.

Krusse, trustee for said Kruse Company, testified in substance that:

Total contract price was approximately $780,000:[17]

Labor costs 20 to 35 per cent of total 35 per cent of $780,000 ..... $273,000

Bal.—Cost of material $507,000

50 per cent of material delivered by June 14, 1949 ..... $253,500

60 to 70 per cent of material came from without the State. 60 per cent thereof amounts to $126,750

From the foregoing compilation it appears and the undersigned finds that as of June 14, 1949, the Kruse Company sold and delivered to Stonestown project in interstate commerce goods valued at $126,750.[18]

Alfred F. Levi, salesman with W. P. Fuller and Company, testified in substance: That his company sold and installed all glass in Stonestown apartments; that approximately $48,000 worth of glass was purchased and shipped to California from without the State of California; that approximately $2,000 worth of glass was purchased within the State of California; that he personally supervised the installation of all the glass in Stonestown apart-

[17]The exact figures are $779,341.47. The figure $780,000 is used as a round number in this instance.

[18]The findings made in this section are based on the credited testimony of Edward H. Kruse, trustee.

ments; and that of the $48,000 worth of glass so installed 50 per cent or $24,000 worth was in the company warehouse at the time the contract to furnish and install it was made.

From the foregoing it appears that $48,000 worth of glass was actually transported in interstate commerce; and that approximately $24,000 worth of glass was sold, shipped, and transported in interstate commerce in 1949.[19]

From the foregoing findings it appears that in 1948 Reed performed services for the Pacific Telephone and Telegraph Company in the amount of $148,000. Since the sum so paid to Reed was for work done on a telephone exchange, such services were necessary to the operations of said Telephone and Telegraph Company. As found above, the Board has heretofore asserted jurisdiction over this company. Also, as found above, Reed in 1948, performed services for the Pacific Gas and Electric Company in an amount in excess of $60,000 for certain work on a substation necessary to such Gas and Electric Company in its operations. Since such services aforesaid are and were valued at $50,000 per annum or more, the Board will exercise juris-

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[19]W. Boyd Stewart, secretary for Stonestown Development Corporation and other Stonestown corporations, testifying as a witness herein, on July 5, 1950, stated that the apartment buildings were practically 99 per cent completed, from which the undersigned infers that at least 50 per cent of the glass panes were installed in 1949, inasmuch as it is a normal practice to install glass as one of the final operations in enclosing such structures.

diction over enterprises, such as Reed's shown herein, by virtue of the fact such services so furnished are necessary to the operations of other employers engaged in commerce.[20] In 1949, as above found, Reed performed, under the terms of a subcontract, $150,000 in construction services for The Pacific Telephone and Telegraph Company of a 9- to 10-story building to be used as an office building and telephone exchange necessary in the operations of said company's business, both intrastate and interstate. What has been said above with reference to the 1948 contract covering Reed's sale of services to said Telephone and Telegraph Company is equally applicable to the 1949 transactions. [21]

It has been found that Reed had a subcontract covering certain masonry work performed in 1949 on the $6,000,000 addition to the Standard Oil Company of California's home office building, in the amount of $200,000.

In a recent Board decision in re Standard Oil Company of California and Oil Workers Union, CIO,[22] the Board, with reference to commerce, found:

> During 1948, the Respondent produced in the State of California over 70 million barrels of refined petroleum products of which more than

[20]See Hollow Tree Lumber Company, 91 NLRB No. 113; Rock Asphalt, Inc., and General Contracting Employers' Association, 91 NLRB No. 228.

[21]See footnote next above.

[22]91 NLRB No. 87.

75 per cent was shipped to points located outside the State of California. During 1949 substantial amounts of Respondent's product was shipped from its California refineries to points located outside the State of California.

It would appear from the record that the new or additional office building constructed in 1948 and 1949 for Standard Oil Company of California was and is necessary to Standard Oil Company's operation, and it is so found. Inasmuch as Reed's services under his subcontract were valued at $50,000 or more, the Board, under its recently promulgated decisional standards having to do with its exercise and assertion of jurisdiction or declining so to do, depending as to whether the policies of the Act would be effectuated by the exercise of jurisdiction in any given case, should assert and exercise jurisdiction on the basis of the facts found above in connection with Standard Oil Company of California.[23]

The record indicates that while Stoneson Development Corporation's project, when completed, will cost about $10,000,000, that at the time of the hearing but some $3,688,000 had been expended on the project.

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[23]Hollow Tree Lumber Company, supra.

Part of the material received in interstate commerce by Stoneson to date of hearing was approximately as follows:

Seller	Material	Total Cost	Amount in Commerce
Pomeroy & Co.	Lumber	$300,000	$180,000
I. J. Kruse Co.	Heating, plumbing	780,000	126,000
Fuller & Co.	Window glass	50,000	48,000[24]
		Total	$354,000

From the foregoing it appears that Stoneson Development Corporation is engaged in commerce within the meaning of the Act; and inasmuch as Reed's services under his subcontract valued at $110,239 or more than $50,000 was and is necessary to Stonestown project's operations, such facts standing alone, would warrant the Board's assertion of jurisdiction herein. It is so found.

On the basis of the foregoing and upon the entire record, the undersigned concludes and finds that Respondent Reed's operations have and tend to have a direct and substantial effect upon interstate commerce as defined by the Act; and that the policies of the Act will be effectuated by the Board's asserting and exercising jurisdiction herein.

II. The Labor Organization Involved

International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, is a labor organization within the meaning of Section 2(5) of the Act.

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[24]Other items of lesser amounts could have been included in this compilation.

III. The Unfair Labor Practices

A. The discriminatory discharge of Ernest Sydney Charlton; interference, restraint and coercion.

1. The sequence of events; the facts

Claimant Charlton joined Local No. 36 in August 1906. He has been a member of said Local continuously since that date, with the exception of one occasion when he was injured in about 1915. He did not work for almost 12 months and was reinstated in his membership in 1916, "at half the amount" of union dues during the time he was unable to work.

On and prior to May, 1949, Charlton was employed by Harry E. Drake, a masonry contractor in San Francisco, California. On or about May 11, 1949,[25] Charlton was laid off. Drake testified that Charlton worked until May 11, 1949, when according to the latter he applied to Reed's superintendent, one John Dikerman,[26] for a job and "he signed me up." Charlton was employed at the Stonestown project and worked until June 14, 1949.

At about 11 a.m. Joseph A. Murphy appeared at the job site and talked to some of Reed's bricklayers. Ray Green, a bricklayer then employed by

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[25]The record does not fix the exact date that Charlton was laid off by Drake and the date he was employed by Reed. The parties stipulated that he was employed by Reed and the latter's foreman, Patrick McDonaugh, estimated the time as 4 or 5 weeks.

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[26]Dikerman was not called as a witness.

Reed, informed Charlton that "Murphy's going to have you put off the job, and if Pat [Patrick McDonaugh, Reed's foreman] won't fire you he's going to pull the men off the job, the other hod carriers, and tie the job up."

Foreman McDonaugh testified that when he came upon the scene he found one, Sweeney a hod carrier, walking away with his duffel bag and asked, "What's the matter?" Sweeney replied, "Well, . . . Joe [Murphy] blew the job." In connection with his talk with Murphy, McDonaugh testified:

> Q. Who is Joe?
>
> A. Joe Murphy. So I says to Joe, "What's going on here?" "Well," he says, "they can't work with this man on the job." So, I says, "Well, let it go until noontime, Joe, and I'll take care of him." No, he had to be laid off right then. (Emphasis added.)
>
> Q. Excuse the interruption, did he say who was this man?
>
> A. Well, he just said this man. I don't think he mentioned the name or anything like that. He just said they can't work with that man Mr. Charlton.

Murphy in part testified:

> Q. Did you talk to the employer and ask him to lay Charlton off?
>
> A. I told the foreman the hod carriers weren't going to work with this individual until he did get a clearance.[27]

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[27]The Union contended that Charlton should not have gone to work for Reed without a prior "clear-

Murphy held no conversation with Charlton, but handed him a "citation" to report on June 17, 1949, before Local No. 36's executive committee. According to Charlton he went to the union hall and found no hod carriers in session.[28]

In connection with Charlton's termination Reed's answer alleged, as follows:

> Answering the allegation contained in paragraph V of the complaint, Respondent avers that on June 14, 1949, his foreman laid off Ernest Sydney Charlton upon the request and demand of the business agent of Respondent Union. He denies that such layoff was for the reason that he had been advised that said Charlton was not in good standing as a member of Respondent Union,[29] and in this connec-

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ance" from Local No. 36. There is no contention or evidence that the Union had a union-shop contract or any contract covering Reed's employees on June 14, 1949.

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[28]There is testimony of a second citation being served on Charlton by the Union and testimony that he did not attend any session of the executive committee. Since Local No. 36 had no contract with Reed covering the latter's employees, Charlton's affairs with Local No. 36 can have no bearing on the issues herein. It is so found.

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[29]Reed's foreman, McDonaugh, testified that Business Agent Murphy had told the former that Charlton could not work for Reed "on account of the man not being clear. He said the man would have to have clearance."

> tion, he alleges that the said layoff was for the sole reason that said business threatened at said time and place, that unless said Charlton left the project, said business agent would cause all other hod carriers working on said project to leave the project immediately.

Reed further justified his layoff of Charlton, as follows:

> * * * In this case there was a weak link and it had to be straightened out and in this present case the man was told he could come back to work as soon as he had straightened the weak link out; [complied with the Union's rules] straightened himself out.[30] Otherwise my job would have been tied up and the performance of my contract would have been imperilled.

On the basis of the foregoing and the record it would appear that Charlton's discharge, and means by which it was occasioned, were each in violation of the Act, unless the contention of the Respondent parties referred to below have merit.

2. Issues; contentions; conclusions

Respondent Reed contends in substance and effect that:

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[30]It should be noted that Reed had or made no complaint that Charlton was not a competent workman. The above testimony indicates a disposition on Reed's part to concede to Local No. 36 such rights as would be recognized under the Act only after the proviso to Section 8 (a) (3) of the Act had been complied with by the way of an election.

(1) The Board should decline to assert jurisdiction herein, as such assertion would not effectuate the policies of the Act; (2) Charlton's layoff not a violation of Section 8 (a) (1) and (3) of the Act, since it did not restrain or coerce Charlton from exercising his rights to refrain from engaging in concerted activities for purposes of collective bargaining, nor did such layoff encourage or discourage Charlton to become or remain a member of Respondent Union; and (3) assuming that the Board assert jurisdiction herein and assuming further that it determines that Respondent Reed has violated provisions of the Act, the entry of a back-pay order would not effectuate the policies of the Act.

As to contention (1), the undersigned has found above in Section I that the Board not only has jurisdiction herein, but also finds that the policies of the Act will be effectuated by the Board's asserting and exercising such jurisdiction. Respondent Reed's contention (1) is without merit. It is so found.

As to contention (2), wherein Respondent Reed contends in effect that since Charlton has been a lifetime member of Local No. 36 and has not been expelled from or resigned from the Union that his layoff by Reed has not restrained or coerced him from (a) exercising his "right to refrain from engaging in concerted activities for the purposes of collective bargaining or other mutual aid or protection, (b) nor did it encourage or discourage the Charging Party [Charlton] to become or remain a member of Respondent Union."

In this connection Respondent Reed's brief states as follows:

> The Charging Party has been a member of the Respondent Union continuously since 1906, with the exception of a brief period in 1915 and 1916 when he was incapacitated by an injury. He has not been expelled from the Union, nor has he voluntarily resigned his membership. Respondent Union demanded that he be laid off solely because of his failure to comply with a Union rule requiring that members report any change in their employment to the Union.
>
> In view of the Charging Party's long-continued membership in the Union and his claim to Union membership up to the very date of the hearing, the charge that his layoff by Respondent Employer "restrained" or "coerced" him from refraining from Union membership or activity within the meaning of section 7 of the Act is wholly unreliable. It is not reasonable to conclude that a man who has supported a union for more than forty years would suddenly desire to withdraw from the union because of the threat of disciplinary action for violation of a rule requiring that a change in employers be reported to the Union. We submit that Respondent Employer's action in laying off the Charging Party until he straightened out his difficulty with the Union Business Agent could not possibly have "coerced" or "encouraged" the Charging Party to remain a member of

> Respondent Union for the simple reason that the Charging Party had no desire or intention to relinquish his Union membership. For the same reason, such action cannot be said to have "encouraged" the Charging Party to become or remain a member of the Union. (Emphasis in original.)

The foregoing quoted portion of Respondent's brief is anomalous to say the least. However, it is significant for the admissions contained therein, namely:

> We submit that Respondent Employer's action in laying off the Charging Party until he straightened out his difficulty with the Union Business Agent could not possibly have "coerced" or "encouraged" the Charging Party to remain a member of Respondent Union * * *

As to (2) (a), the record discloses that Charlton after his layoff by Reed sent his union dues to Respondent Union and that such dues were returned by the latter, thus on the surface and on the record, Charlton desires to retain his union membership but further desires to refrain or absent himself from attending trials by the Union executive committee. Under the Act Charlton has the right to refrain from such activities in part or in whole as he may see fit. The Union's constitution and/or bylaws may and probably does permit Local No. 36 to expel a member who refuses to submit to a trial or hearing before such executive committee upon service of a "citation," such as is referred to elsewhere in the record.

The fact that Charlton has not seen fit to voluntarily resign from the Union does not imply that his discharge by Reed was not discriminatory.[31] The facts are that Charlton under Section 7 of the Act was at liberty to refrain from any concerted activity with his fellow union members or others regardless of the nature of the activity whether to join in the attendance of a social meeting or submit to a trial or hearing before the Union's executive board; and in the absence of a union-shop agreement between the Union and Reed, the latter was without legal authority to discharge or lay off Charlton "until he straightened out his difficulty with the Union Business Agent." Charlton's termination by Reed under the circumstances was in violation of Section 8 (a) (1) and (3) of the Act since it sought to force Charlton to engage in certain concerted activities from which he desired to refrain. It is so found.

As to (2) (b), it is clear from the foregoing and the record that Reed's discharge of Charlton on June 14, 1949, would by reason of fact that Charlton had for upwards of 40 years been a union mem-

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[31]It may well be that without membership in Local No. 36 it would be impossible for Charlton to follow his trade in the San Francisco Bay Area at all. From the record it may be inferred that all masonry contractors and subcontractors make wage agreements with interested unions. Reed, in fact testified: "* * * We also make and have a three months' negotiated wage agreement which gives us our scale of wages to be paid to the different trades."

ber worker in the Building Trades where closed-shop conditions have generally existed, have impelled Charlton to retain membership in Local No. 36 or run the chance of being deprived of a continuing opportunity to earn his livelihood at his trade. Moreover, it is clear that by Reed's admitted action through his foreman, Patrick McDonaugh, on June 14, 1949, in laying off Charlton until he complied with the demands of Business Agent Murphy of Local No. 36, Reed thereby granted to and served notice on all masonry employees that he had granted to Local No. 36 the benefit of a closed-shop contract, notwithstanding neither Reed nor Local No. 36 had complied with the proviso of Section 8 (a) (1) and (3) of the Act. Contention (2) is without merit. It is so found.

As to contention (3), wherein Reed contends that in the event the Board asserts jurisdiction and determines that Reed has violated provisions of the Act, that it would not effectuate the policies of the Act to enter a back-pay order against Reed. In his argument in support of this contention, Reed's counsel argues that Charlton's difficulty with his Union was "over an essentially trivial matter, that he endangered the employment of the entire crew of 10 men." If the foreman had not yielded to the demands of the Union's business agent, a work stoppage would have resulted which would have tied up the job indefinitely.

Whether Charlton's difficulty with his Union was over a trivial matter or not, it was of no concern to Reed since the latter had no union or closed-shop

contract requiring him to discharge his employees on demand of the Union; and while the Union might have caused the crew of 10 men to leave the job with a loss to Respondent Reed, such fact would not justify or excuse Reed for violating the Act.[32] Contention (3) is without merit. It is so found.

The Respondent Union in substance and effect contends that:

Reed's operations and purchases of materials being mostly intrastate and his interstate purchases of materials being but a small percentage of his total, that his operations pose questions, as follows:

> (a) Fail to affect commerce within the meaning of the Act so that the "Board would lack jurisdiction to hear an alleged unfair labor practice case * * *"; or
>
> (b) If some remote effect on commerce could be found in said contractor's business essentially local in its nature and character, so that it would not effectuate the policies of the Act to assert jurisdiction in the alleged unfair labor practice case.

On the whole, Respondent Union's brief, which incidentally discloses considerable amount of research, contends and argues to the effect that the Board does not have jurisdiction herein; that if it

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[32]The Board and the courts have long and consistently held that economic exigency does not excuse violations of the Act. Star Publishing Co., 97 F. 2d 465-467 (C.A. 9); Guy F. Atkinson Co., et al., 90 NLRB No. 27.

should determine otherwise it should refuse to assert jurisdiction since Respondent Reed's interstate business affects commerce with the "de minimus doctrine"; and that if it is found that some remote effect upon commerce by Respondent Reed is found, despite that, his business is essentially local in its nature and character and it would not effectuate the policies of the Act to assert jurisdiction.

For the reasons set forth in connection with the consideration of Respondent Reed's contention, the undersigned is of the opinion that the Board has and should assert jurisdiction herein, which findings therefore answer Respondent Union's posed questions (a) and (b) in finding that Reed's operations have a continuous and important effect upon the flow of commerce in both the building industry as such and in other industries serving and engaged in commerce. It is so found.

From the foregoing and upon the entire record it appears and the undersigned finds that Respondent Reed discriminated in regard to the hire and tenure of employment of Ernest Sydney Charlton by his discharge on June 14, 1949, caused in part at least by Respondent Union's insistence and threats to the effect that all hod carriers would be removed from the job if Charlton was not removed instantly; and by Respondent Reed's acquiescing in demands for Charlton's termination, and by granting, in effect, closed-shop rights to Respondent Union, thereby encouraging membership in the Union, and enabling Respondent Union to enforce

obedience by its members to such rules as Respondent Union had or may prescribe, all contrary to the Act, Respondent Reed has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

By the making of; enforcing of such demands; and by causing Respondent Reed to so discriminate against Charlton, Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and 8 (b) (2) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondents set forth in Section III, above, occurring in connection with the operations of Respondent Reed described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondents have engaged in certain unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that Respondent Reed offer Ernest Sydney Charlton immediate and full

reinstatement to this former or substantially equivalent position[33] without prejudice to his seniority or other rights and privileges, jointly and severally with Respondent Union, make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him of a sum of money equal to that which he would normally have earned as wages from the date of his discharge to the date of Respondent Reed's offer of reinstatement, less his net earnings[34] during such period. The loss of pay will be computed on a quarterly calendar basis, in accordance with the formula adopted by the Board in F. W. Woolworth Company, 90 NLRB No. 41. Earnings in one particular quarter will have no effect upon the back-pay liability for any other quarter. The

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[33]In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible and if such position is no longer in existence then to a substantially equivalent position." See The Chase National Bank of The City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827.

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[34]By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for this unlawful discrimination and the consequent necessity of his seeking employment elsewhere. Crossett Lumber Company, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered earnings. Republic Steel Corporation v. NLRB, 311 U.S. 7.

undersigned also recommends that Respondent Reed make available to the Board, upon request, pay roll and other records to facilitate back-pay computations. F. W. Woolworth Company, supra.

Conclusions of Law

1. International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By acquiescing in the demands for; by, in effect, granting closed-shop rights to Respondent Union contrary to the proviso of Section 8 (a) (3) of the Act, all to the end that the Union could enforce obedience by its members to such rules as the Union had or might prescribe; and to encourage membership in the Union Respondent Reed thereby engaged in unfair labor practices within the meaning of Section 8 (a) (1) and 8 (a) (3) of the Act.

3. By the making of; enforcing of such demands and causing Respondent Reed to so discriminate, Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

4. By discriminating in regard to the hire and tenure of employment of Ernest Sydney Charlton, thereby encouraging membership in the Union, and enabling the Union to enforce obedience by its members to such rules as the Union has or may prescribe, Respondent Reed has engaged in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act.

5. By causing Respondent Reed to discriminate against said Ernest Sydney Charlton, as aforesaid, Respondent, Union has engaged in unfair labor practices within the meaning of Sections 8 (b) (2) and 8 (b) (1) (A) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the cases, the undersigned recommends that:

1. The Respondent Reed, his officers, agents, successors, and assigns shall:

a. Cease and desist from:

(1) Encouraging membership in International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, or in any other labor organization of his employees, by acquiescing in the demand for and granting closed-shop rights, contrary to the Act, to aid the Union in the enforcement of its rules and regulations among its membership; from discharging and refusing to reinstate employees pursuant to such demand as aforesaid, unless and until the Respondent Union be authorized as provided in Section 8 (a) (3) of the Act.

(2) In any other manner, discriminating against or otherwise interfering with, restraining, or coercing his employees in the exercise of the rights guaranteed in Section 7 of the Act, including the

right to refrain from membership in and obedience to the rules of Local No. 36 or any other labor organization.

b. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(1) Offer to Ernest Sydney Charlton immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges and jointly and severally with Respondent Union made him whole in the manner set forth in Section V, above, entitled "The remedy."

(2) Upon request, make available to the Board of its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Recommended Order.

(3) Post in conspicuous places at his main office in San Francisco, California, and at the Stonestown project, and at all other places where notices to employees are customarily posted, copies of the notice attached hereto and marked "Appendix A." Copies of this notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent Reed or his respective representative, be posted by him immediately upon receipt thereof and be maintained by him for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondent Reed to insure that said notices are not altered, defaced, or covered with other material.

(4) Notify the Regional Director for the Twentieth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report what steps he has taken to comply herewith.

2. The Respondent Union, International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Encouraging membership in International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, or in any other labor organization of Respondent Reed's employees, by demanding and causing Respondent Reed to grant to Respondent Union "closed-shop" rights, contrary to the Act, in order to aid Respondent Union in the enforcement of its rules and regulations among its membership;[35] and causing Respondent Reed to discharge and thereafter refuse to reinstate employees as an aid to the Union's enforcement of its rules and regulations against its membership, unless and until a union-shop agreement has been duly authorized as provided in Section 8 (a) (3) of the Act.

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[35]The undersigned does not question the Union's right to prescribe its own rules with respect to the acquisition and retention of membership in the Union by such members, but does find and hold that it may not enforce such rules by demanding and forcing employers to discriminate against employees in the absence of compliance with the proviso of Section 8 (a) (3) of the Act.

(2) Causing or attempting to cause Respondent Reed and his agents, successors, or assigns to discriminate against their employees or prospective employees because they are not members in good standing in Local No. 36, except in accordance with the provisions of Section 8 (a) (3) of the Act.

(3) In any other manner restraining or coercing employees of Respondent Reed in the exercise of the right to refrain from any or all of the concerted activities within the meaning of Section 7 of the Act.

(4) Causing or attempting to cause any other employer engaged in commerce within the meaning of the Act to discriminate against Charlton, except in accordance with Section 8 (a) (3) of the Act.

(5) In any other manner restraining or coercing Charlton, as an employee or prospective employee of any other employer engaged in commerce within the meaning of the Act, in the exercise of his right to refrain from any or all concerted activities within the meaning of Section 7 of the Act.

b. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(1) Jointly and severally with Respondent Reed, make Ernest Sydney Charlton whole for any loss of pay suffered by reason of the discrimination against him, and in the manner set forth in Section V, above, entitled "The remedy."

(2) Post immediately in conspicuous places at its business office, and at all other places where notices to its members are customarily posted,

copies of the notice attached hereto marked "Appendix B." Copies of this notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by official representative of Local No. 36, be posted by it immediately upon receipt thereof and be maintained for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Local No. 36 to insure that said notices are not altered, defaced, or covered by any other material.

(3) Notify George W. Reed, in writing, and furnish a copy to Ernest Sydney Charlton, that Respondent Union has no objection to Charlton's employment by Reed.

(4) Notify the Regional Director for the Twentieth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report what steps it has taken to comply herewith.

It is further recommended that unless on or about twenty (20) days from the date of the receipt of this Intermediate Report, Respondent Reed and the Respondent Union notify the aforesaid Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring them or any of them, as the case may be, to take the action aforesaid.

Dated at Washington, D. C., this 29th day of January, 1951.

/s/ PETER F. WARD,
Trial Examiner.

Appendix A

Notice to all Employees

Pursuant to
the Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not enter into, be party to, or otherwise participate in the enforcement of any agreement or arrangement, written or oral, with International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, which requires that we grant to Local No. 36 the right to demand dismissal of any of our employees who are not in good standing with Local No. 36, in that they have failed or refused to obey some rule of Local No. 36 except to the extent authorized by the Act, and when such requirements have been met by said Local.

We Will Not discharge employees or refuse to hire employees because they are not members of Local No. 36 in good standing or otherwise discriminate against or interfere with, restrain, or coerce our employees or prospective employees in the exercise of the right to refrain from engaging in concerted activities as guaranteed in Section 7 of the Act.

We Will make whole Ernest Sydney Charlton for any loss of pay resulting from his discriminatory discharge.

All our employees are free to become or remain or free to refrain from becoming or remaining members in good standing of Local No. 36 or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

GEORGE W. REED
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B

Notice to All Members of
International Hod Carriers, Building & Common Laborers Union of America, Local No. 36.

Pursuant to
the Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not demand or enforce demands for closed or union-shop rights over employees of George W. Reed for the purpose of enforcing obedience to union rules by its members or cause or attempt to cause Reed to discriminate against an employee for such purpose unless and until we are duly authorized to do so in

accordance with Section 8 (a) (3) of the Act. We Will Not in any other manner cause or attempt to cause George W. Reed to discriminate against employees or prospective employees in violation of Section 8 (a) (3) of the Act, and we will not in any other manner restrain or coerce employees or prospective employees in the exercise of rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will notify George W. Reed in writing, and furnish copies to Ernest Sydney Charlton, that we have no objection to his employment by George W. Reed.

We Will make whole Ernest Sydney Charlton for any loss of pay he may have suffered by reason of the discrimination against him.

INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION OF AMERICA, LOCAL No. 36.

(Labor Organization)

Dated .....

By .....,

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[As amended by order dated February 6, 1951 and corrected by Peter A. Ward, Trial Examiner.]

United States of America Before the National Labor Relations Board

[Title of Causes.]

RESPONDENT UNION'S EXCEPTIONS TO INTERMEDIATE REPORT

The Respondent Union, International Hodcarriers, Building & Common Laborers Union of America, Local No. 36, AFL, hereby excepts to the Intermediate Report of the Trial Examiner, dated January 29, 1951, in the above entitled proceeding in the following particulars:

Reference to Intermediate Report

Page 7, Lines 45-50—1. To that part of the Trial Examiners findings based upon the evidence in the entire record, as well as the evidence stated in the Intermediate Report on Page 7, lines 9 to 18 and lines 25 to 44, to the effect that the employer, Respondent Reed's operations have and tend to have a direct and substantial effect upon interstate commerce as defined by the Act; and that the policies of the Act will be effectuated by the Board's asserting and exercising jurisdiction herein.

Page 15, Lines 50-54—2. To that part of the Trial Examiners recommendation that in its practical effect prohibits the Union from having any Union security contract of any nature with the

employer, as for example, a Union shop, except in accordance with the provisions of Section 8(a) (3) of the Act.

Dated: This 1st day of March, 1951, at San Francisco, California.

Respectfully submitted,

/s/ WATSON A. GARONI,
Attorney for Respondent Union.

United States of America Before the National Labor Relations Board

[Title of Causes.]

STATEMENT OF EXCEPTIONS OF RESPONDENT GEORGE W. REED

Respondent George W. Reed submits the following statement setting forth his exceptions to the intermediate report of the Trial Examiner herein and to rulings upon motions and objections and the other proceedings hereafter specified:

1. Respondent excepts, generally and specifically, to said intermediate report insofar as it finds and concludes that the National Labor Relations Board should assert and exercise jurisdiction over Respondent's operations.

[Argumentative material deleted therefrom.]

* * *

2. Respondent excepts, generally and specifically, to the finding of the Trial Examiner that Respond-

ent's operations have and tend to have a direct and substantial effect upon interstate commerce as defined in the National Labor Relations Act.

* * *

3. Respondent excepts, generally and specifically, to the finding of the Trial Examiner that it would effectuate the policies of the Act for the Board to assert and exercise jurisdiction in this case.

* * *

4. Respondent excepts, generally and specifically, to the finding of the Trial Examiner that Respondent has engaged in unfair labor practices within the meaning of section 8 (a) (1) (3) of the Act.

* * *

5. Without limitation of the foregoing exceptions, Respondent excepts to the following findings of fact of the Trial Examiner for the reasons stated:

(a) Page 10, line 19; page 11, line 51; page 12, line 18—The findings that Respondent's contentions are without merit.

* * *

(b) Page 11, lines 47 to 49—The finding that in laying off the complainant Respondent "thereby granted to and served notice on all masonry employees that he had granted to Local No. 36 the benefit of a closed-shop contract."

* * *

(c) Page 12, lines 50 to 52—The finding that Respondent's operations have a continuous and im-

portant effect upon the flow of commerce in both the building industry as such and in other industries serving and engaged in commerce.

* * *

(d) Page 13, lines 20 to 24—The finding that Respondents' activities have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

* * *

6. Respondent excepts to the recommendation of the Trial Examiner that Respondent offer to complainant immediate and full reinstatement to his former or substantially equivalent position.

* * *

7. Respondent excepts to the recommendation of the Trial Examiner that Respondent be ordered, jointly and severally with Respondent Union, to pay complainant a sum of money equal to that which he would normally have earned as wages from the date of his layoff by Respondent to the date of an offer of reinstatement, less his net earnings during such period.

* * *

8. Respondent excepts, generally and specifically, to Conclusions of Law Nos. 2 through 6 upon the grounds that none of them is supported by the evidence, and that they are contrary to law.

9. Respondent excepts, generally and specifically,

to each and every one of the recommendations of the Trial Examiner upon the ground that Respondent has not violated any provision of the Act, and that the affirmative action referred to in such recommendations is not required to effectuate the policies or purposes of the Act.

10. Respondent excepts, generally and specifically, to each ruling of the Trial Examiner adverse to Respondent on objections to the introduction of evidence, motions to strike and other objections and motions made on behalf of Respondent during the course of the hearing before the Trial Examiner.

11. Without limitation of the foregoing exceptions, Respondent excepts to the ruling denying the motion of Respondent to dismiss the complaint.

* * *

Dated: March 8, 1951.

GARDINER JOHNSON,
THOMAS E. STANTON, JR.

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Respondent
George W. Reed.

Received March 16, 1951.

United States of America Before the
National Labor Relations Board

DECISION AND ORDER

On January 29, 1951, Trial Examiner Peter F. Ward issued his Intermediate Report in the above-entitled proceedings, finding that Respondent Reed, herein referred to as the Employer, and Respondent Local No. 36, herein referred to as the Union, had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the Employer and the Union filed exceptions to the Intermediate Report and supporting briefs.

The Board[1] has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the Trial Examiner's findings, recommendations, and conclusions, to the extent that they are consistent with our conclusions and order, hereinafter set forth.

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[1]Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

1. We agree with the Trial Examiner that the Employer's operations are subject to the Board's jurisdiction. In so doing, however, we rely entirely upon the jurisdictional facts, fully set forth in the Intermediate Report, showing that the Employer, in 1948 and 1949, furnished services valued at more than $50,000 per annum necessary to the operation of (1) a public utility, (2) an instrumentality of commerce, and (3) an enterprise engaged in producing or handling goods, destined for out-of-State shipment, valued at more than $25,000 per annum.

Upon the basis of these facts we find, in accordance with the recently adopted jurisdictional policy of the Board,[2] that the Employer is engaged in commerce within the meaning of the Act and also that it will effectuate the policies of the Act to assert jurisdiction here.[3]

2. With respect to the termination of Charlton's employment, it is clear from the record that Charlton was discharged by the Employer at the insistence of the Union because he did not have "clearance" from the Union. There was no union-security agreement in existence which might have afforded the Employer and the Union a valid basis for the discharge. We find, therefore, that the Employer,

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[2]Hollow Tree Lumber Company, 91 NLRB No. 113.

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[3]See Edward Besch & Sons, 92 NLRB No. 84; William W. Kimmins & Sons, 92 NLRB No. 25; and White Construction and Engineering Company, Inc., 92 NLRB No. 17.

by discharging Charlton, has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act;[4] and we find further that the Union, by causing the Employer to discharge Charlton, has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and Section 8 (b) (2) of the Act.[5]

The Remedy

We have found that the Employer discriminated against Charlton in violation of Section 8 (a) (1) and (3) of the Act, and that the Union caused the Employer to discriminate against Charlton in violation of Section 8 (b) (1) (A) and Section 8 (b) (2) of the Act. Therefore, as the Trial Examiner recommended, we shall order the Employer to offer Charlton immediate reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges.

---

[4]The Employer contends that, as Charlton still retained his membership in the Union, his discharge did not encourage or discourage membership in the Union, and that, therefore, there could be no violation of Section 8 (a) (3) of the Act. We reject this argument for reasons fully set forth in American Pipe and Steel Corporation, 93 NLRB No. 11. Although dissenting in that case, Member Murdock deems himself bound by the majority decision therein.

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[5]American Pipe and Steel Corporation, supra; Peerless Quarries, Inc., 92 NLRB No. 184; and Clara-Val Packing Company, 87 NLRB 703. See also Sterling Furniture Company, et al., 94 NLRB No. 20.

As we have found that both Respondents are responsible for the discrimination suffered by Charlton, we shall order them jointly and severally to make Charlton whole for the loss of pay that he may have suffered by reason of the discrimination against him. It would, however, be inequitable to the Union to permit the amount of its liability for back pay to increase despite the possibility of its willingness to cease its past discrimination, in the event that the Employer should fail promptly to offer reinstatement to Charlton. We shall therefore provide that the Union may terminate its liability for further accrual of back pay to Charlton by notifying the Employer, in writing, that the Union has no objection to his reinstatement. The Union shall not thereafter be liable for any back pay accruing after 5 days from the giving of such notice. Absent such notification, the Union shall remain jointly and severally liable with the Employer for all back pay to Charlton that may accrue until the Employer complies with our order to offer him reinstatement.

In all other respects we adopt the recommendations made by the Trial Examiner in the section of the Intermediate Report entitled "The remedy."

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

1. The Respondent George W. Reed,[6] his agents, successors and assigns, shall:

a. Cease and desist from:

(1) Encouraging membership in International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL,[7] or in any other labor organization of his employees, by discharging and refusing to reinstate any of his employees for failing to obtain clearance from the Union or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

(2) In any other manner interfering with, restraining, or coercing his employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement executed in accordance with Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Offer to Ernest Sydney Charlton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges, and jointly and severally with the Union make him whole in the manner set forth in the section entitled The

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[6]Hereinafter referred to as the Employer.

---

[7]Hereinafter referred to as the Union.

Remedy, for any loss of pay suffered by reason of the discrimination against him.

(2) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amount of back pay due and the right of reinstatement under the terms of this Order.

(3) Post in conspicuous places at his main office in San Francisco, California, and at the Stonestown project, and at all other places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix A.[8] Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Employer or his representative, be posted by him immediately upon receipt thereof and be maintained by him for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Employer to insure that such notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps he has taken to comply herewith.

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[8]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words "A Decree of the United States Court of Appeals Enforcing."

2. The Respondent International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL, its officers, representatives, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Causing or attempting to cause the Employer, his agents, successors, and assigns, to discharge or otherwise discriminate against any of its employees because they failed to obtain clearance from the Union, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

(2) In any other manner causing or attempting to cause the Employer, his agents, successors, and assigns, to discriminate against his employees in violation of Section 8 (a) (3) of the Act.

(3) Restraining or coercing employees of the Employer, his successors or assigns, in the exercise of the rights guaranteed in Section 7 of the Act.

(4) Causing or attempting to cause any other employer engaged in commerce within the meaning of the Act to discriminate against Ernest Sydney Charlton for failing to obtain clearance from the Union, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

(5) In any other manner restraining or coercing Ernest Sydney Charlton, as an employee or prospective employee of any other employer engaged in commerce within the meaning of the Act, in the exercise of his right to refrain from any or all concerted activities within the meaning of Section 7 of

the Act, except to the extent that such right may be affected by an agreement executed in accordance with Section 8 (a) (3) of the Act.

b. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Jointly and severally with the Employer make Ernest Sydney Charlton whole, in the manner set forth in the section entitled The Remedy, for any loss of pay he may have suffered by reason of the discrimination against him.

(2) Post immediately in conspicuous places at its business office, and at all other places where notices to its members are customarily posted, copies of the notice attached hereto and marked Appendix B.[9] Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by an official representative of the Union, be posted by it immediately upon receipt thereof and be maintained for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that such notices are not altered, defaced, or covered by any other material.

(3) Notify the Employer, in writing, and furnish a copy to Ernest Sydney Charlton, that the Union has no objection to Charlton's employment by the Employer.

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[9]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words "A Decree of the United States Court of Appeals Enforcing."

(4) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

Signed at Washington, D. C., May 18, 1951.

PAUL M. HERZOG,
Chairman,

JAMES J. REYNOLDS, JR.,
Member,

ABE MURDOCK,
Member,

[Seal] NATIONAL LABOR RELATIONS BOARD.

Appendix A

Notice to All Employees Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not encourage membership in International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, or in any other labor organization of our employees, by discharging and refusing to reinstate any of our employees for failing to obtain clearance from Local No. 36, or by discriminating against our employees in any other manner in regard to their hire or

tenure of employment or any term or condition of their employment, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement executed in accordance with Section 8 (a) (3) of the Act.

We Will offer to Ernest Sydney Charlton immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority, or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him.

All of our employees are free to become, remain, or to refrain from becoming or remaining, members of Local No. 36 or any other labor organization, except to the extent that this right may be affected by an agreement executed in accordance with Section 8 (a) (3) of the Act.

GEORGE W. REED,
(Employer).

Dated.....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B

Notice

To all members of International Hod Carriers, Building and Common Laborers Union of America, Local No. 36, AFL, and to all employees of George W. Reed.

Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause or attempt to cause George W. Reed, his agents, successors, and assigns, to discharge or otherwise discriminate against any of his employees because they failed to obtain clearance from this union, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

We Will Not in any other manner cause or attempt to cause George W. Reed, his agents, successors, and assigns, to discriminate against his employees in violation of Section 8 (a) (3) of the Act.

We Will Not restrain or coerce employees of George W. Reed, his agents, successors, and assigns, in the exercise of the rights guaranteed them in Section 7 of the Act.

We Will make Ernest Sydney Charlton whole for

any loss of pay he may have suffered because of the discrimination against him.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL No. 36, AFL.
(Union)

Dated .....

By .....,
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board

Twentieth Region

Case No. 20-CA-268

In the Matter of:

GEORGE W. REED

and

ERNEST SYDNEY CHARLTON, an Individual.

Case No. 20-CB-80

In the Matter of:

INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION OF AMERICA, LOCAL No. 36, AFL,

and

ERNEST SYDNEY CHARLTON, an Individual.

Room 634, Pacific Building,
San Francisco, California
Wednesday, July 5, 1950

Pursuant to notice, the above-entitled matters came on for hearing at 10 o'clock a.m.

Before: Peter F. Ward, Esq., Trial Examiner.

Appearances:

THOMAS E. STANTON, JR., ESQ.,

San Francisco, Calif.,

Appearing on Behalf of George W. Reed.

WATSON A. GARONI, ESQ.,

200 Guerrero St.,
San Francisco, Calif.,

Appearing on Behalf of International Hod Carriers, Building & Common Laborers Union of America, Local No. 30, AFL.

BENJAMIN B. LAW, ESQ.,

San Francisco, Calif.,

Appearing for General Counsel of National Labor Relations Board.

GORDON W. MALLATRATT, ESQ.,

625 Market Street,
San Francisco, Calif.,

Appearing for E. S. Charlton.

* * *

PROCEEDINGS

* * *

Mr. Law: Mr. Examiner, I will at this time offer in evidence the formal documents in the case which I have marked as General Counsel's Exhibit 1, parts A to K, inclusive. [6*]

* * *

Mr. Law: General Counsel's Exhibit 1, part A, is the original charge filed by Ernest Sydney Charlton on July 6, 1949, against International Hod Carriers, Building and Common Laborers of America, A. F. of L., Local 36, Case No. 20-CB-80. General Counsel's Exhibit 1, part B, is the original charge filed by the same person on the same date against George W. Reed, the employer, Case No. 20-CA-268. General Counsel's Exhibit 1, part C, is the original Complaint in this matter issued by the Regional Director for the Twentieth Region of the National Labor Relations Board on May 12, 1950. Part D is an order of [7] the same date by the Regional Director consolidating the two cases for hearing and a notice of consolidated hearing. Part E is an affidavit of service of a copy of the original charge in Case No. 20-CA-268 upon George W. Reed, which affidavit has a copy of the return receipt attached to it. General Counsel's Exhibit 1, part F, is a similar affidavit of service of a copy of the original charge in 20-CB-80 upon the Respondent Union, and that exhibit also has a return receipt from the Union attached to it. General

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Counsel's Exhibit 1, part G, is an affidavit of service of the order consolidating cases and notice of consolidated hearing the Complaint and charges upon the two Respondents here and Ernest Sydney Charlton, the charging party. Part H is a notice of advancement of hearing date issued by the Regional Director on May 26, 1950, and part I is an affidavit of service of notice of advancement of hearing date upon the parties. Part J is a copy of the original Answer filed by the Respondent Union in this matter, and in that connection I might state that the original Answer was received in this office and, due to some error, whether clerical or my own, I do not know, the original charge, though we know it was received, cannot now be located, so a copy which was sent to us——

Examiner Ward: You referred to it as the charge. You mean the Answer?

Mr. Law: Yes. Did I say charge? I meant to speak of [8] the Answer of the Respondent Union.

Trial Examiner Ward: That is J?

Mr. Law: Yes. Now part K is the original Answer of the Respondent, George W. Reed. It may appear from the filing dates that both Answers were filed more than ten days after issuance of the Complaint. However, General Counsel is not seeking any judgment or other action here based on the tardiness of the Answers. There were reasons for that tardiness which I don't think are material here. We make no claim based upon it.

I will now offer General Counsel's Exhibit 1, parts A to K, inclusive.

Trial Examiner Ward: Any objections?

(No response.)

Trial Examiner Ward: General Counsel's Exhibit 1-A to 1-K, inclusive, will be received in evidence.

(Thereupon the documents above referred to were marked General Counsel's Exhibit No. 1-A to 1-K, inclusive, in evidence.) [9]

* * *

Mr. Law: As the first witness for the General Counsel I would like to call as an adverse witness Mr. Joseph Murphy.

JOSEPH A. MURPHY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

Mr. Garoni: If the Trial Examiner please, I would like to respectfully suggest to the Trial Examiner that there seems to be a serious controversy here as to whether or not Interstate Commerce exists and as to whether or not under the circumstances the Board would have jurisdiction. Normally we would be [10] permitted the right to object to any testimony other than on the strict

(Testimony of Joseph A. Murphy.)

Interstate Commerce Commission basis. I offer a suggestion that we could save a lot of time and money to all litigants, as well as the time of the Board here, if it is definitely a question of Interstate Commerce, which it appears to be. It is not facetious.

Trial Examiner Ward: It is the practice of the Examiner to permit all Counsel to present their case in their own particular manner insofar as possible and when it comes questions of commerce they sometimes can take endless time in getting it out. So it has been the practice of this Examiner for many years to permit all Counsel to present their case in their particular style and after their usual practice to the end that when we get through we will have it all.

Mr. Garoni: If the Board definitely doesn't have jurisdiction, Mr. Trial Examiner, the proceeding of the case on merits would be irregular, and the District Court has held that there can be an objection to the introduction of other evidence.

Trial Examiner Ward: It is not always possible to determine instantly whether the record will show commerce or not. One party may think that it does and the other not, and it may take some time for the Examiner and the Board to determine whether the record on the whole does show commerce.

Mr. Garoni: The contention is why go into the merits [11] if the jurisdiction isn't there in the first place. In fact it would be illegal going into the merits.

(Testimony of Joseph A. Murphy.)

Trial Examiner Ward: We will permit Counsel to present it in his manner.

Mr. Law: I might state in this connection that ordinarily I would proceed only to establish jurisdiction first, but in this particular case I think the facts in my view, at the present time at least, are very simple, and for the convenience of witnesses I think it will be of considerableness, convenience, if we can go ahead as we now propose to do.

Mr. Garoni: For the record then I offer an objection to the introduction of evidence on the basis of Interstate Commerce.

Trial Examiner Ward: The objection will be overruled and you have a continuing objection.

Q. (By Mr. Law): Mr. Murphy, what is your full name and business address, for the record?

A. Joseph A. Murphy, 200 Guerrero Street.

Q. What is your position?

A. Business representative.

Q. Of what?

A. Hod Carriers, Local 36.

Q. What is the full and correct name of that?

A. International Hod Carriers, Building and Common Laborers of America. [12]

Q. Local No. 36? A. Local No. 36.

Q. And is the name—has the name also have A. F. of L. as a part of it?

A. No, we are A. F. of L.

Q. And for how long have you held that position? A. March, 1936.

(Testimony of Joseph A. Murphy.)

Q. In what geographical—I will ask you first where are the headquarters of Local 36?

A. 200 Guerrero Street.

Q. In San Francisco? A. Yes.

Q. And in what geographical area does the Union operate?

A. San Francisco County.

Q. And that is coterminus, is it not, with the City of San Francisco? A. Correct.

* * *

Mr. Law: The next witness is also called as an adverse witness, Mr. Patrick McDonough. [13]

PATRICK McDONOUGH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Law:

Q. Mr. McDonough, will you state your full name and business address for the record?

A. Patrick McDonough, 538 - 25th Avenue.

Q. And is that San Francisco?

A. Yes, sir.

Q. What is your occupation, Mr. McDonough?

A. Brick mason.

Q. What is your present position?

A. Foreman, bricklayer.

Q. Foreman for what?

(Testimony of Patrick McDonough.)

A. Foreman for George Reed.

Q. And for how long have you held that position?

A. Oh, off and on ten or twelve years.

Q. Now do you know Mr. Joseph Murphy, who just testified? A. Yes, sir.

Q. For how long have you known him?

A. Well, I guess he was Business Agent, I believe about that time.

Q. Since 1935?

A. Yeah, around that time, I guess.

Q. Now do you know Ernest Sydney Charlton?

A. Yes, sir.

Q. Do you see him in the room at the present time? A. Yes, the man back there.

Q. Now did Mr. Charlton—I believe the pleadings establish adequately that Mr. Charlton was employed by Mr. Reed; is there any dispute on that score?

Mr. Garoni: No objection; we will stipulate.

Mr. Stanton: No objection.

Trial Examiner Ward: Parties all stipulate to that?

Mr. Garoni: Yes.

Mr. Stanton: Yes.

Mr. Mallatratt: Yes.

Trial Examiner Ward: The record will so show.

Q. (By Mr. Law): Now, Mr. McDonough, did Mr. Charlton enter Mr. Reed's employ during May of 1949?

(Testimony of Patrick McDonough.)

A. Well, I don't know the date. I don't know when he was employed. I just know he came to work there, that's all. I don't know the date.

Q. All right, you remember it as about that time?

A. Well, I couldn't say the month or the day or anything like that.

Q. You remember about how long he worked for Mr. Reed? In 1949?

A. No, I don't. Four or five weeks, I imagine; maybe not that. I don't think it was that long. [15]

Mr. Garoni: I will object to the conclusion of the witness and ask that it be stricken.

Trial Examiner Ward: Overruled.

Q. (By Mr. Law): All right; now in what capacity did Mr. Charlton work for Mr. Reed in 1949? A. As a hod carrier.

Q. And on what job did he work?

A. Stonestown job.

Q. Is that the Stonestown Apartment project in San Francisco? A. Yes.

Q. All right. Now, did you discharge Mr. Charlton? A. Well——

Mr. Stanton: I object to that as calling for the conclusion of the witness.

The Witness: I just laid him off, I didn't discharge him at the time, no.

Q. (By Mr. Law): All right.

A. I told him he'd have to straighten out.

Q. Now you testified about a layoff of Mr. Charlton by you. Would you tell us in your own

(Testimony of Patrick McDonough.)

words the circumtances of that layoff?—just tell us what happened.

A. Well, when I came over there from another part of the building there I saw the hod carrier walking away with his duffel bag and I said, "What's the matter?" "Well," he said, "Joe, blow the job." [16]

Mr. Garoni: I object to that as being hearsay as to what the other man said, not being present.

Trial Examiner Ward: Overruled.

Q. (By Mr. Law): What other hod carriers were there?

A. A man by the name of Sweeney.

Q. And who is Sweeney?

A. Another hod carrier.

Q. On the same job? A. That's right.

Q. Was he in the employ of George Reed?

A. That's right.

Q. All right. Then what happened?

A. Well, in the meantime Joe came up there.

Q. Who is Joe?

A. Joe Murphy. So I says to Joe, "What's going on here?" "Well," he says, "they can't work with this man on the job." So I says, "Well, let it go until noontime, Joe, and I'll take care of him." No, he had to be laid off right then.

Q. Excuse the interruption; did he say who was this man?

A. Well, he just said this man. I don't think he mentioned the name or anything like that. He just said they can't work with that man, Mr. Charlton.

(Testimony of Patrick McDonough.)

Q. All right; then what?

A. Well, he wouldn't agree to that, so I talked it over and I said, "You see what's the matter here, we'll have to hold [17] up here until we get this straightened out." So I laid him off then or called it a layoff. So in the meantime, during the noon hour we talked it over and I said, "What's the matter?" Joe in the meantime had told me he couldn't work there. I asked him why he couldn't work there and he said on account of the man not being clear. He said that the man would have to have a clearance; anybody on that job would have to have a clearance. So in the noontime I said to Syd, "Why don't you go down and get a clearance and I'll put you back to work; I'll be glad to do that." Well, he said he didn't think Joe would do that, so that's the end of the story. I never saw the man until the other day since he got laid off there or held up there or whatever it is.

Q. All right; now, throughout your account when you referred to "Joe" who did you mean?

A. I meant Mr. Murphy. He is known as Joe, Joe Murphy.

Q. And when you referred to "Syd" who did you mean?

A. I meant the other guy, Mr. Charlton.

Q. Now where did this conversation occur?

A. Right on the job.

Q. And what's "the job"?

A. Out at Stonestown.

Q. The Stonestown Apartment project?

(Testimony of Patrick McDonough.)

A. That's right.

Q. Now do you remember the date of that conversation? [18] A. No, sir.

Q. May it be stipulated that that occurred on June 14, 1949?

Mr. Garoni: Agreed. I will stipulate to the conversation taking place on the date of the meeting out there.

Mr. Law: I am asking for a stipulation as to the date of the conversation without asking the parties to stipulate that Mr. McDonough's account is entirely true or correct.

Trial Examiner Ward: I see. And what is the desire of Counsel for the opposition?

Mr. Garoni: We will stipulate that there was a meeting on that date and some conversation took place, but not as to what conversation took place.

Mr. Stanton: Our pleadings admit that there was a layoff on that date of Mr. Charlton following a conversation with the Business Representative of the Union.

Trial Examiner Ward: The record will show that is the statement of Counsel.

Q. (By Mr. Law): Now at that time that you told Mr. Charlton to lay off, was anyone else present? A. No, I don't believe there was.

Q. Where was Mr. Murphy at that time?

A. Well, he was in the vicinity. He had a car parked out by the job there within twenty or thirty feet, but he gave me the orders. He requested the man be laid off, but he wasn't there during the conversation with Charlton. He wasn't [19] there at

(Testimony of Patrick McDonough.)

that time. I agreed in the meantime to settle the thing to get the job going.

Q. All right. Now, how many other hod carriers were there on the job in Mr. Reed's employ at that time?

A. Well, I believe there were four more.

Q. And were there also bricklayers?

A. Yes, sir.

Q. How many bricklayers?

A. Five or six, anyhow.

Q. Were there any other employees of Mr. Reed other than hod carriers and bricklayers?

A. No, I don't believe there was.

Q. Now, very briefly, for the record, although this is probably something that the Board could take notice of, what do the bricklayers do, or what were they doing at that—on that project?

A. Laying bricks.

Q. What were the hod carriers doing?

A. Tending to the bricklayers.

Q. Do the hod carriers take the bricks and the mortar to the bricklayers? A. That's right.

Q. Do the bricklayers work without hod carriers?

A. No. A real layer can't do their own hod carrying. If the hod carrier has gone away for ten or fifteen minutes he [20] might have sufficient stock up there to keep him going for ten or fifteen minutes, but otherwise they don't work without hod carriers.

* * *

(Testimony of Patrick McDonough.)

Cross-Examination

By Mr. Stanton:

Q. Mr. McDonough, would you remain for one or two further questions? In your direct examination you spoke about a statement by Mr. Murphy that unless Mr. Charlton would remove from the job, he, Murphy, would pull the job; is that right?

A. Yes, he said the hod carriers couldn't work with that man. That's the statement he made.

Q. So that your understanding of the term "pull the job" was that the other four hod carriers on the job would not work? A. That's right.

Q. Is that correct? A. Yes, sir.

Q. Do you know whether the other four hod carriers were members of Local 36 of the Hod Carriers Union?

A. Well, I assumed they were. They had been around here for years. They were sent out from the Union time and time again.

Q. Was there something said in the course of the conversation between you and Mr. Murphy concerning a clearance? [21] A. Yes, sir.

Q. What was said by Mr. Murphy on that subject?

A. He said no man could work on that job until he had been cleared through the Union.

Q. Did he say anything further with regard to the nature of the clearance?

A. No, he stated that was the law; that nobody

(Testimony of Patrick McDonough.)

could work on that job without being cleared. That's the law of the Union, I mean.

Mr. Stanton: I have no further questions at this time.

Q. (By Mr. Garoni): Mr. McDonough, were you present at the time the conversation between Mr. Murphy and Mr. Charlton took place?

A. No, sir.

Q. You spoke of Mr. Sweeney being pulled off the job; is that correct?

A. Well, yeah, he wasn't pulled off; he never went off the job. That's why I called him, he was walking away from the job; in other words, walking towards his stuff there.

Q. Did you speak to Mr. Sweeney about what was going on?

A. Yes, I asked—that's the first I knew of this trouble between Charlton and Mr. Murphy.

Q. What did Mr. Sweeney say to you?

A. He said Joe told him that he couldn't work with this man, and I knew who he referred to then. I guess the man's name was [22] mentioned, Charlton's name.

Q. Do you think that Mr. Murphy ordered him off the job?

A. He said they couldn't work there while Charlton was on the job; that's what he said.

Q. About what time of the day did this take place? A. Just before noon.

Q. How close to noontime?

A. About ten or fifteen minutes, I imagine.

(Testimony of Patrick McDonough.)

Q. Many men were leaving those jobs around that time, were they not? A. Well——

Q. Did you observe men going to lunch about that time?

A. Well, this was about fifteen minutes to 12:00, I imagine.

Q. About what time do those men leave for lunch on the job?

A. Well, some of them leave five minutes ahead of time.

Q. Over to a lunch wagon?

A. Something like that.

* * *

Q. And did you get any instructions from your employer, Mr. Reed, to discharge Mr. Charlton?

A. No, sir. [23]

Q. You did this on your own, this layoff, as you call it? A. That's right.

Q. Did you actually tell Mr. Charlton that he was fired? A. No, sir.

Q. You merely requested him to get a clearance card and come on back? A. That's right.

Q. And he didn't do that?

A. I requested him to hold up until the thing got settled.

Q. In any event he never came back?

A. No, I never saw the man again.

* * *

(Testimony of Patrick McDonough.)

Q. To get a little clearer picture of what Mr. Reed was [24] doing on the job, would you explain just what brick work was being done on the job?

A. Well, they was building some flower boxes in front of the apartment houses.

* * *

Redirect Examination

By Mr. Law:

Q. Mr. McDonough, on the Stonestown job who, for Mr. Reed, hired and discharged the hod carriers and brick layers?

A. Whoever is foreman on the job hires and fires them, as far as I know of. On my job I have that privilege.

Q. Did you do the hiring?

A. I didn't hire Mr. Charlton, no. He was sent from another [25] job.

Q. I am asking you, did you hire hod carriers?

A. When I needed them, yes.

Q. And did you discharge them if the occasion warranted?

A. Yes, sir. But if I hired a hod carrier I hired him through the Union. I couldn't just let a man come on the job that wanted to be hired; I couldn't do that. I got to call up the Hod Carriers Local and get a man through the Local.

Q. I take it, then, that you hired through the Hod Carriers Union; is that correct?

A. Well, the men I had, had been working for

(Testimony of Patrick McDonough.)

Reed for a number of years. They had been cleared on other jobs and naturally they didn't require a clearance when they worked in that shop.

Q. When you get new employees, do you clear them through the Hod Carriers Union?

A. They have to be cleared through the Hod Carriers Union.

* * *

Recross-Examination

By Mr. Garoni:

Q. In the normal course of hiring men, [26] don't you confer with Mr. Reed as to whether they should be hired or not? A. No, sir.

Q. You do that individually on your own?

A. Yes.

Q. Let me ask, so far as hiring men through the Union, isn't that about the only source for the hod carriers that you have? A. Yes, sir.

Q. And that is one of the predominant reasons why you hire them through the Union?

Mr. Law: I object on the ground that it is immaterial.

Trial Examiner Ward: He may answer.

A. That's the local procedure. We have to hire them through the Local. We are requested to, I guess.

Q. (By Mr. Garoni): At least to be sure you get the best hod carriers?

A. Yes. That's the only source, in fact.

* * *

Mr. Law: Before I call the next witness, to make the [27] record clear on one point, I will state that I did not ask Mr. Murphy questions in detail about the Union of which he is Business Agent because I believe that it is established through the pleadings that it is a Labor Organization within the meaning of the Act. If there is any doubt on that score——

Trial Examiner Ward: I got the impression that both parties admitted that.

Mr. Garoni: That is correct.

Mr. Stanton: We haven't traversed that issue; we have assumed that, too.

Mr. Garoni: Well, the Unions do not deny the fact that they are Labor Organizations.

Trial Examiner Ward: You grant that?

Mr. Stanton: Yes, our pleadings—we haven't put that in issue. As a matter of fact, I think probably our answer——

Trial Examiner Ward: I just got the impression as I passed through the plea hastily that that part had been admitted.

Mr. Garoni: That's right.

Trial Examiner Ward: But to be certain that Counsel for the Respondent agrees.

Mr. Stanton: Mr. Trial Examiner, we're in no position to delve into the internal affairs of the Union, so that we're not bringing that up as an issue. We have admitted that allegation in our [28] Answer.

* * *

GEORGE REED

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Law:

Q. What is your full name and business address for the record?

A. George W. Reed, 1390 South Van Ness Avenue.

Q. That is in San Francisco?

A. That's right.

Q. And you are engaged as an individual in the business of a masonry contractor, are you not?

A. That's right.

Q. Do you work as a masonry contractor principally in the San Francisco area?

A. Mostly in the San Francisco area.

Q. You do take some jobs outside of the city, do you not?

A. Occasionally outside the city limits, yes.

Q. Now for how long have you been engaged as a masonry contractor? A. As an individual?

Q. Yes.

A. Approximately nine years. [29]

Q. What materials do you regularly use in the ordinary course and conduct of your business?

A. Well, mostly brick, mortar, some tile, terra cotta, glazed tile units, would comprise just about the bulk of our work.

Q. And do you also use certain tools?

(Testimony of George Reed.)

A. No; certain tools, small tools and mortar mixers and wheelbarrows.

Q. All right. Now, I want to develop for the record a general picture of your operation. You usually work under contract, do you?

A. Mine are usually subcontracts under a general contract.

Q. And in the field of masonry contracting, do you specialize in any particular type of masonry work, or do you do whatever the contract may call for? A. Whatever the contract may call for.

Q. Now, what classifications of employees do you have? A. Bricklayers and hod carriers.

Q. I'll ask you how many bricklayers and hod carriers do you employ at the present time?

A. How many am I employing at the present time?

Q. Yes. A. In San Francisco?

Q. Well, in your total operations at the present time.

A. Oh, I would say approximately fifteen bricklayers and ten hod carriers. [30]

Q. Now is that a representative figure of your average employment?

A. That is low; the average will run slightly higher through the year.

Q. Now, Mr. Reed, I want to ask you about your operations in the 1948 and '49 and in 1950 up to date, so I'll start with 1948 and I'll ask you what is the gross value of your operations for 1948 in terms of dollars?

* * *

(Testimony of George Reed.)

Q. (By Mr. Law): Mr. Reed, still referring to the 1948, I'll ask you what was the biggest job, dollarwise, that you [31] had in that year, the biggest contract?

A. I'd say the addition to the Pacific Gas and Electric Building, a hundred and forty-eight thousand.

Q. That was the dollar value of your contract, was it? A. That's right.

Q. Now what type of structure was that that you were working on under that contract?

A. That was an addition to a telephone exchange. It was laying the brick walls for an addition to a telephone exchange.

* * *

Q. (By Mr. Law): I am a little confused, Mr. Reed. You state that this was laying brick walls for an addition to a telephone exchange and that the contract was for the Pacific [32] Gas and Electric Company.

A. My contract was with Mudsen Brothers as a general contractor.

Q. And for what firm was the telephone exchange being constructed?

A. The telephone exchange was for the telephone company.

Q. Is that the Pacific Telephone and Telegraph?

A. Pacific Tel. and Tel., yes.

Q. So if I understood you to say Pacific Gas

(Testimony of George Reed.)

and Electric Company a while earlier—did I misunderstand you?

A. You did misunderstand me.

Trial Examiner Ward: The Examiner understood it to be the Pacific Gas and Electric Company. But the facts are that it is not the Pacific Gas and Electric Company, but the Pacific Telephone and Telegraph?

The Witness: Pacific Tel. and Tel.

Trial Examiner Ward: That straightens it out on the record.

Q. (By Mr. Law): Is that the Pacific Telephone and Telegraph Company, to use its full name? A. That's right.

Q. Now, how long were you on that job? From what date until what date, giving the dates as close as you can remember them?

A. Approximately six months; I don't remember the dates.

Q. How about the months? [33]

A. Well, if I were to guess at the months it would only be a guess without looking at the records and the books I couldn't guess.

Q. It was during 1948, you know that though, is that correct?

A. As I remember it it was in 1948.

Q. Now, you say this building was a telephone exchange?

A. Addition to a telephone exchange; to the present telephone exchange.

(Testimony of George Reed.)

Q. I see. And it was located in San Francisco?

A. Yes, sir.

Q. Now what other big jobs did you have in 1948, if any?

A. Oh, if I remember right I did the PG & E in '48 for Dahl, Young and Nelson.

Q. Now what was the value of that contract?

A. Sixty odd thousand; sixty one or sixty two, sixty three; some place in there; around sixty thousand.

Q. You say that was on a sub station for the Pacific Gas and Electric Company?

A. That's right.

Q. In San Francisco? A. That's right.

Q. And how long did that operation take? Your part of it.

A. As I remember about three months.

Q. Now what other large jobs did you have in 1948?

A. Oh, in '48 I did hundreds of chimneys and fireplaces, [34] mainly for Bohannon over at San Lorenzo Village.

Q. Now was that work for Bohannon in one large contract or one contract?

A. It was in two or three small contracts on the one project.

Q. What was the aggregate value of the two or three contracts?

A. Oh, around twenty-five or thirty thousand dollars.

(Testimony of George Reed.)

Q. And that, you say, represented fireplaces and chimneys? A. Fireplaces and chimneys.

Q. About how many fireplaces and chimneys would that contract cover, or those contracts?

A. In that unit I believe we put up three or four hundred.

Trial Examiner Ward: Off the record.

(Discussion off the record.)

Trial Examiner Ward: On the record.

Q. (By Mr. Law): Now you say this was at San Lorenzo, California? A. That's right.

Q. And what was the nature of the project, the total project?

A. It's a residential project, a small one family dwellings.

Mr. Garoni: May I ask you what project are we talking about?

The Witness: Bohannon, San Lorenzo Village.

Q. (By Mr. Law): Now this Bohannon, do you know—is that an individual or a corporation?

A. It's David Bohannon Company. [35]

Q. That is a corporation, is it not?

A. I believe it is.

Q. And he is the builder of the housing project in San Lorenzo? A. That's right.

Q. Now was that a subcontract on your part or did you contract directly with Bohannon Company?

A. That was a subcontract under Bohannon. Mine are all subcontracts unless I deal directly with the owner.

Q. And Bohannon then was the general con-

(Testimony of George Reed.)

tractor rather than the owner, or was he both in this case?

A. He was both in this case. [36]

* * *

Mr. Law: Mr. Examiner, before I resume questioning of Mr. Reed I would like to propose to the parties a stipulation which we have discussed off the record and that is that the Pacific Telephone and Telegraph Company and the Pacific Gas and Electric Company to which Mr. Reed referred in his testimony this morning are Public Utilities with their main offices in San Francisco, California. Can that be stipulated?

Mr. Stanton: We will so stipulate.

Mr. Garoni: So stipulated.

Trial Examiner Ward: The record will so indicate.

Q. (By Mr. Law): Mr. Reed, you testified this morning about a telephone exchange upon which you had a masonry contract being built for the Pacific Telephone and Telegraph Company. Did you visit the job site during your work on that building? A. Several times, yes.

Q. Could you describe the building for the record?

A. Well I can describe it if you can get a picture from my [38-39] description. The original building was a three story reinforced concrete with brick curtain walls and the addition consisted of two stories to go on top of the original building and a

(Testimony of George Reed.)

five story annex alongside the same structure so that the whole building now is a five story building where originally it was a three story.

Q. And if you know, is the building used as a telephone exchange?

A. To the best of my knowledge it is.

Q. Now, similarly you testified about a substation upon which you worked, the substation being built for the Pacific Gas and Electric Company. Did you visit that job site? A. Several times.

Q. Could you describe that substation?

A. Well, that was a new building, reinforced concrete building with masonry facing and that brings power from the Hunters Point substation and it brings it into the substation at Eighth and Mission and it distributes from there.

Q. And when you refer to the Hunters Point plant are you referring—well I won't characterize. It is a steam generating plant of the Pacific Gas and Electric Company? A. That's right.

Q. At Hunters Point. A. Yes.

Q. Is that the one referred to by the Pacific Gas and Electric [40] Company as Station B?

A. I believe so.

Q. All right. Now, turning to 1949, what was your first major job during 1949?

A. Well, I'll give you another Pacific Tel and Tel job at Pacific and Capp.

Q. What was the value of that contract?

A. Approximately one hundred fifty thousand.

Q. And is that in San Francisco? A. Yes.

(Testimony of George Reed.)

Q. And what was the job on that, I mean what type of building did it involve?

A. That was a reinforced concrete building with a terra cotta facing.

Q. And what was the nature of the building, for what purpose was it used?

A. That is the Mission office that is used partly as office building and partly as an exchange, I suppose, because there was a lot of equipment on the upper floors. It was an office building combination.

Q. The hundred fifty thousand dollar figure you gave at first was the value of your contract, was it not? A. That's right.

Q. And that building is ten stories or over, is it not?

A. Nine or ten. I think it went to ten. I think it's a [41] nine story building.

Q. And that building was an entirely new building? A. That was a new building.

Q. Now by Pacific Tel and Tel you refer to the Pacific Telephone and Telegraph Company, it's the same company for which you had worked in 1948?

A. That's right.

Q. All right, what was the next major job for 1949?

A. Well, when you say next these jobs in 1949 as I can look at them here, they all dovetail. The next job we really started was the Stonestown project.

Q. Now what was the value of your contract there?

(Testimony of George Reed.)

A. Approximately a hundred thousand dollars.

Q. And that was in San Francisco?

A. That's right.

Q. Now this Stonestown project was an apartment development, was it not? Or is it an apartment development? A. Correct.

Q. Now what work did your contract cover?

A. My contract, the largest percentage was garages, concrete block garages, open garages with flower box trimmings around wood structures and boiler room chimneys.

Q. How many boiler room chimneys did that cover? A. Five or six chimneys in there.

Q. Did those chimneys—were they intended to serve the [42] heating plant, if you know, which serves the Stonestown apartments?

A. I suppose they were, although they were only vent chimneys because the heating plant is all gas. The heating plants and the laundries, they have them separated from the apartments.

Q. All right, now, it was on this project that Mr. Charlton's employment was terminated, was it not?

A. That's right.

Q. All right. Now, what was your next major contract in 1949?

A. Well, I wouldn't say the next, but a similar contract at Hillsdale Apartments in San Mateo for the Bohannon organization; twenty-five thousand dollar contract similar to Stonestown.

Q. What are Hillsdale Apartments?

(Testimony of George Reed.)

A. They are in San Mateo just across from the Bay Meadows race track.

Q. Is it a garden apartments development?

A. It's a garden apartments development very similar to Stonestown and my work was similar; concrete block garages, a few chimneys and mostly flower box work, trimmings around the rest of the buildings.

Q. Now your next major job in 1949?

A. Well, I did the addition to the Macy's Store.

Q. Is that in San Francisco? A. Yes.

Q. What was the value of that? [43]

A. Approximately fifty-seven thousand dollars.

Q. Here again that figure referred to the value of your contract? A. Right.

Q. Now what was the work you did for them?

A. Installing a terra cotta face and interior tile partitions.

Q. And what is the size of the building?

A. That is an eight or nine story building.

Q. Is that new construction?

A. That was a new construction addition to the present building.

Q. And the Macy's Store to which you referred is a San Francisco department store, is it not?

A. That's right.

Trial Examiner Ward: Macy's?

Mr. Law: Macy's.

Trial Examiner Ward: Part of the New York Macy's? Pardon the interruption, it's immaterial. I know there is a Macy's in New York.

Q. (By Mr. Law): What is the correct name,

(Testimony of George Reed.)

if you know, Mr. Reed, of Macy's of San Francisco?

A. M-a-c-y apostrophe s, as far as I know. I believe that's the way you write a check out to them.

Q. Now what was your next large job in 1949?

A. Standard Oil addition. [44]

Q. All right. Now what was the value of your contract there?

A. Approximately two hundred thousand.

Q. You say the Standard Oil addition. To what are you referring?

A. That is an addition to the Standard Oil office building.

Q. Is that the office building of the Standard Oil Company of California? A. That's right.

Q. And if you know, is that their main office building located at 225 Bush Street, San Francisco?

A. That's right.

Q. Now what was the size of this building, or what is the size?

A. A twenty-two stores, I think.

Trial Examiner Ward: Twenty-two?

The Witness: Yes.

Q. (By Mr. Law): And that is a new building?

A. That is a new structure, yes.

Q. It adjoins——

A. It adjoins the old structure.

Q. And what work did you do on that?

A. Terra Cotta and brick facing.

Q. Now what other major jobs in '49?

A. That's about the extent of '49.

(Testimony of George Reed.)

Q. You did have other smaller jobs, did you?

A. Oh, jobs that run from twenty-five dollars up to three or four thousand.

Q. All right. Now, 1950. What major jobs have you had this year?

A. Practically none. I have started the Soledad prison job at Soledad, California.

Q. And the approximate size of the contract there? A. Eighty thousand.

Q. Is that a State prison?

A. That's a State prison.

Q. And have you had other smaller jobs this year?

A. I am also doing a job at Ukiah, the Mendocino County courthouse which as a twenty thousand, approximately twenty thousand dollar job.

Trial Examiner Ward: That is outside of San Francisco?

The Witness: Yes, sir.

Trial Examiner Ward: That is the first job you have mentioned out of the City? [46]

* * *

Q. All right. Now, you testified that in your ordinary operations you use brick and mortar, tile, terra cotta and glazed tile units?

A. That's right.

Q. In 1949 what was the approximate value of those materials used by you?

A. Approximately eighty thousand dollars.

Q. And where did you obtain the materials?

A. They are all obtained through local dealers

(Testimony of George Reed.)

here in town. They are all manufactured locally. Some of the products come directly from the plants like brick and glazed tile and terra cotta, although they have their offices here, the orders are put in, but they truck directly from the plants to the job.

Q. If you know, are all of those products made in California?

A. All of them are made in California.

Trial Examiner Ward: Off the record.

(Discussion off the record.)

Trial Examiner Ward: On the record.

Q. (By Mr. Law): Only one or two other questions, Mr. Reed. I notice that in the Answer filed in this matter which you verified there is the statement in paragraph two that less [47] than three per cent of the amount of eighty thousand dollars represented materials and supplies originating from points outside the State of California. To what materials do you refer by that less than three per cent? I realize that could be.

A. Well, we did buy a small job for a residence out in St. Francis Wood with the Indiana limestone in 1949 and the price of that limestone delivered here was around nineteen hundred dollars.

Q. And that came from Indiana, did it?

A. Indiana.

Q. Have you purchased any materials from outside the State in 1950? A. No, I have not.

Mr. Law: No other questions.

Trial Examiner Ward: You may cross-examine.

(Testimony of George Reed.)

Cross-Examination

By Mr. Garoni:

Q. Mr. Reed, I would like to examine these materials a little bit more that you spoke of that you are using in your business. For instance the hollow glazed tile, where is that manufactured, please?

A. That's made in two places surrounding the Bay. One at Niles, California, and one at Lincoln, California.

Q. Where is the material from which the hollow glazed tile is manufactured obtained from?

A. Well, that's clay right out of the ground at the plant. [48]

Q. In the State of California? A. Right.

Q. How about terra cotta tile, where is that manufactured?

A. That's manufactured at the same plants. Also there is another plant up at Stockton, California that manufactures hollow tile.

Q. Where is the material that the terra cotta is made from obtained?

A. They set their plant up right alongside of a bed there where they can take it out of the ground and burn it.

Q. That is in the State of California also?

A. Right.

Q. How about the heitite blocks. You testified, did you that you get those glass blocks?

A. Heitite blocks are made at San Rafael.

Q. And where is the material obtained from from which these blocks are made.

(Testimony of George Reed.)

A. At San Rafael, right at the plant.

Q. How about the cement, where is that manufactured?

A. Cement is manufactured at Redwood City, Santa Clara, Mt. Diablo; all local cements.

Q. And all of these places are within the State of California, that you are testifying up to this point? A. Yes, sir.

Q. Now the materials—the raw materials from which the [49] cement made is it obtained within the State of California?

A. Yes, it is dug out of the hills right alongside the plant.

Q. Where is the mortar manufactured?

A. Well, mortar is the combination of cement, lime and sand.

Q. And that is made particularly where?

A. You mix that up yourself. We mix it ourselves.

Q. How about brick, where is it manufactured?

A. Brick is manufactured—some at San Rafael, some at Port Costa and some at San Jose. Oh, there is a couple of more plants right in this vicinity.

Q. And that is all made—the material from which that brick is manufactured is obtained from where?

A. It is a local—right where the plants are located.

Q. Within the State of California?

A. Yes.

Q. You testified that there were several items,

(Testimony of George Reed.)

Indiana limestone, structural glass block, I believe that was obtained from without the State?

A. That's right.

Q. Were they obtained for a number of jobs or just one or two particular jobs?

A. Just one or two. I used very little glass blocks and very little Indiana limestone. There isn't a great deal of Indiana limestone.

Q. Let's take the period of 1949 as an example. How much [50] of the limestone was shipped in to you from out of State, what was the limestone, do you recall?

A. Approximately nineteen hundred dollars.

Q. And how about the value of this structural glass that you received within the twelve months period of 1949?

A. As I recall it was very minor because I didn't have any glass block jobs to speak of in '49.

Q. How about 1948. In that entire year in these particular materials that you claim you used in your business, did you obtain any of those materials out of the State in 1948?

A. I don't believe I did.

Q. Up to this point in the year 1950 did you obtain any materials out of State whatsoever?

A. No.

Q. Do you contract, or have you contracted in the year 1948 for any services or sales outside of the State of California? A. No, I have not.

Q. How about the year 1949? Did you do any

(Testimony of George Reed.)

jobs or sell any material outside of the State of California? A. No.

Q. And for this year 1950 have you any jobs outside of the State of California?

A. I have not.

Q. Although you do a great deal of commercial work you are also involved in residential work to a great extent, is that [51] right?

A. That's right.

Q. In particular the Stonestown job, that is residential apartments? A. That is right.

Q. As a matter of fact about what counties in those three years of 1948—in these three years of 1948, 1949 and the balance of 1950 now, in about what counties in California have you done these jobs?

A. Mostly counties bordering San Francisco Bay. I don't recall all the Bay area counties.

Q. What is the greatest distance in the three years which we are speaking about that you travelled or had any jobs away from San Francisco?

A. The jobs that I am doing at present, Soledad and Ukiah.

Q. Those jobs aren't yet being done but are to be done in the future?

A. They are under construction now. I am working on both jobs.

Q. In 1948 you testified about doing a job for the Pacific Telephone exchange. Was there any dispute arose on that job, any manner of Labor dispute?

A. Not that I can remember.

(Testimony of George Reed.)

Q. How about the Pacific Gas and Electric substation that you accomplished in 1948, was there a Labor dispute on that job? [52]

A. No Labor disputes.

Q. In 1949 on all these jobs that you have testified to in the record outside of the Stonestown job was there a Labor dispute of any sort?

A. No.

Q. And to this point in 1950 outside of the Stonestown job in this case has there been a Labor dispute?

A. I haven't had a Labor dispute of this kind in thirty years.

Q. What was the total volume, Mr. Reed, in the twelve months period of 1949 on commercial jobs?

A. Commercial I don't remember. The whole volume was around four hundred fifteen thousand dollars.

Q. How about residential jobs, what was the total volume in the year 1949?

A. I don't remember. I imagine about 50-50 on that.

Q. About—pardon me, I didn't hear you.

A. It was about thirty per cent residential, according to the figures I have got down here.

Q. Do you have an arithmetical summation of the year 1949? A. I have in my possession.

Q. Do you wish to use that. Have you any objection, Counsel, to that last remark of mine?

Mr. Law: I have no objection.

(Testimony of George Reed.)

A. Commercial volume was $415,000; residential was $66,000.

Q. (By Mr. Garoni): In this commercial valuation that includes [53] the Pacific Telephone and Telegraph job, Pacific Gas and Electric substation job and the Standard Oil Building?

A. That's right.

Q. Do you know offhand about how many other commercial buildings you accomplished that time outside of these three buildings?

A. Approximately fifteen.

Q. About how many residential buildings did you contract for during the year 1949, the twelve months. A. Seven.

Q. What was the total of your gross business during the twelve months period in 1949 including commercial and residential? A. $481,869.25.

Mr. Garoni: Just for the purpose of the record, to simplify this, if there is no objection by Counsel here, we have computed what the total value of the materials for the twelve months period in 1949 out of State in percentages was to the gross purchases which amounts to about two and a half to three per cent of the gross purchase was purchased out of State.

Trial Examiner Ward: You may state that.

Mr. Garoni: No objection, I assume?

Mr. Law: No objection to the statement; I don't follow the arithmetic, but I don't dispute it either.

Mr. Garoni: It is about two thousand dollars out

(Testimony of George Reed.)

of [54] State out of eighty thousand, amounts to about two and a half per cent out of State purchase of materials. [55]

* * *

Redirect Examination

* * *

Q. (By Mr. Law): Now, I'm just a little confused, Mr. Reed. You mentioned another Stonestown project or contract for [57] $30,000.00?

A. That's right. The whole contract on the job was around a hundred thousand dollars, but evidently in compiling 1949 this is the amount of material and work done in '49 on Stonestown; the balance must have been done in the latter part of '48, but the girl was only asked to compile '49.

Q. Yes, all right. Now, one other question. Do you at the present time have any executed contracts for major jobs. I'm not asking about prospective jobs but only those for which you have an actual contract. A. You mean signed up?

Q. Yes, other than those you've mentioned.

A. No, I have none. I have a couple of small jobs in town and that's all.

* * *

W. BOYD STEWART

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [58]

Direct Examination

By Mr. Law:

Q. What is your business address, Mr. Stewart?

A. 3455 19th Avenue, San Francisco.

Q. What is your business or occupation?

A. I am secretary for Stoneson Development Corporation and other Stoneson corporations.

Q. How long have you been secretary of the Stoneson Development Corporation?

A. For the Stoneson Development Corporation —it was organized in 1947 so I would be four years with that corporation.

Q. Now, what is Stoneson Development Corporation?

A. The Stoneson Development Corporation are home builders and general contractors.

Q. Now, is that a corporation, is it?

A. That's right.

Q. Is it the developer of Stonestown apartment project? A. Yes.

Q. Now, where is that project located?

A. It's located at 3455 19th Avenue.

Q. That is the address?

A. That's the address of the office, the executive office, and it's located in that immediate vicinity.

(Testimony of W. Boyd Stewart.)

Q. All right. Now, what is the Stonestown apartment project?

A. Well, it's a part of a large building project being developed by Stoneson brothers, consisting of apartment houses for residence, and commercial area.

Q. Do you know about how many apartments are there in the project? A. 683 apartments.

Q. And how much commercial area? That is, covered commercial area.

A. The covered commercial area? It would be in excess of 700,000 square feet.

Q. Now, when was the project started?

A. Along the latter part of 1948, along in September, 1948.

Q. And when is the entire project planned to be completed?

A. Approximately two years from now.

Q. Now, in what stage of development are the apartments which you mentioned, the living apartments.

A. The apartment buildings are practically 99% completed. They will be completed in another 30 to 45 days. The commercial area is in its infancy; it's just beginning.

Q. Now, how large are the apartments?

A. They vary. There are some one-bedroom, some two-bedrooms, some three-bedrooms.

Q. And to what use do you propose to put the commercial area when it is completed?

A. That will all be leased to merchants.

Mr. Garoni: I am going to object as [60] incom-

(Testimony of W. Boyd Stewart.)

petent, irrelevant and immaterial. There is no allegation here of secondary boycott against Stoneson project. We are concerned primarily with Mr. Reed and the disputes concerning Mr. Reed, and I think that is not the issue of the case at all.

Trial Examiner Ward: The objection is overruled, but the plans for the future, that's not material.

Q. (By Mr. Law): All right, now, Mr. Stewart. Approximately what is the total construction cost of the Stonestown project.

A. That's rather difficult to answer. It's part of a large project and I could say in excess of ten million dollars.

Q. Now, what materials, speaking generally, does the Stonestown Development Corporation use in the construction of Stonestown apartment project?

A. There's frame buildings consisting of lumber, stucco, and the concrete buildings, consisting of lumber, concrete and such.

Q. And stucco?

A. Together with various other materials to complete the job: Steel and so forth.

Q. Are the kitchens in the apartments equipped?

A. Yes.

Q. What are they equipped with?

A. Stove and refrigerator and steel cabinets.

Q. And how about the sink?

A. Yes, they have sinks. [61]

* * *

(Testimony of W. Boyd Stewart.)

Mr. Garoni: Well, I object to your whole line of questioning. I firmly believe that the criteria of interstate commerce is not Stonestown project, which the evidence will develop they don't even know how much material came from where, and I know Mr. Stewart does not know that. The criteria is whether Mr. Reed is involved in interstate commerce. He could take a job fifteen minutes for a railroad company and then when a dispute arises say that Mr. Reed was in interstate commerce because he did a fifteen minute job for a railroad company.

Trial Examiner Ward: Well, if that's the questions that have the objections.

Q. (By Mr. Law): What is the approximate value of window sashes used in the project?

A. Do you object to me referring to my list?

Q. I think not.

Mr. Stanton: May we see the list?

A. In excess of a hundred thousand dollars.

Q. What type of sash are those?

A. Steel sash.

Q. And what company supplied them?

A. Salco Steel Products Company.

Q. Its address? [62]

A. 401 Tunnel Avenue, San Francisco.

* * *

Q. (By Mr. Law): Mr. Stewart, I will show you a list which has been marked for identification

(Testimony of W. Boyd Stewart.)

as General Counsel's Exhibit 2, and will ask you what that is.

A. That is a list of the subcontractors on the Stonestown project.

Q. With Stoneson Development Corporation being the prime contractor? A. Yes.

Q. And does the list also show the address of each of the sub-contractors? A. Yes.

Q. And what is the figure on the right-hand side of each of the two pages of the exhibit?

A. $44,690.00 on Page 1——

Q. I mean, what do those figures represent?

A. That's the contract with the Alta Roofing Company of 976 Indiana Street, San Francisco, California, for $44,690.00, covering the roofing.

Q. In other words, does each figure in that [63] column represent the value of the particular subcontractor's contract?

A. Approximately, yes.

Q. Thank you. Now, on the front page of the exhibit to the right of the name H. Peira and Son —that is the third from the bottom—under the heading "Value of Contract", the figure $15,000.00 is written in in pencil. A. Yes.

Q. Is that the approximate value of H. Piera and Son's contract? A. Yes.

Mr. Law: I'll offer in evidence General Counsel's Exhibit No. 2.

Mr. Garoni: I'll object to that as incompetent, irrelevant and immaterial. We are not charged with the disputant Stonestown; we are charged with Mr.

(Testimony of W. Boyd Stewart.)

Reed. If they discovered the situation, why, we'd be in a dispute with Stonestown. There is no allegation incorporated that there is a dispute with Stonestown. This is going pretty far afield. We could never hope to prove how much of this material came over interstate commerce. It would take the whole balance of the year to do that.

Mr. Stanton: The employer will object to the introduction of this testimony on the ground that it's irrelevant, incompetent and immaterial, the particular basis for this [64] objection being that it is going far afield and it departs from the measure that has been used by the Board in other cases in testing its jurisdiction.

Trial Examiner Ward: The objection will be overruled. The exhibit will be received, subject however that at the close of the hearing, counsel may move to strike the exhibit and the Examiner asks counsel to remember to make the motion and not to leave it up to him to remind you of it.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

(Testimony of W. Boyd Stewart.)

GENERAL COUNSEL'S EXHIBIT No. 2

Sub-Contractors

Name and Address	Value of Contract
Alta Roofing Company 976 Indiana, San Francisco, Calif.	$ 44,690.00
Atlas Heating & Ventilating Co. 557-567 Fourth St., San Francisco, Calif.	21,279.20
Barker Bros. 711 South Fowler, Los Angeles, Calif.	342,574.88
Bathroom Accessories Supply 762 Clementina St., San Francisco, Calif.	7,139.49
California Wire Cloth Corp. 1245 Howard St., San Francisco, Calif.	1,498.00
Ceco Steel Products Co. 401 Tunnel Ave., San Francisco, Calif.	113,182.00
Clingan & Fortier 1526 Wallace Ave., San Francisco, Calif.	37,950.00
Theo De Friese 1222 Sutter St., San Francisco, Calif.	40,600.00
Fair Manufacturing Co. 617 Bryant St., San Francisco, Calif.	164,187.00
W. P. Fuller & Co. 301 Mission St., San Francisco 19, Calif.	50,371.20
Gleason & Company 6355 Hollis St., Oakland 8, Calif.	64,089.00
P. Grassi & Company 356 Church St., San Francisco, Calif.	2,952.00
Huettig & Schrom P.O. Box 798, Palo Alto, Calif.	26,576.97
L. J. Kruse Co. 6247 College Ave., Oakland, Calif.	779,341.47
Chas. A. Langlais 474 Bryant St., San Francisco, Calif.	(Approx.) 375,174.96
Mills & Hinz Tile Co. 5945 Mission St., San Francisco, Calif.	(Approx.) 64,031.55
Otis Elevator Co. 1 Beach Street, San Francisco, Calif.	146,690.00
Palace Hardware Co. 569 Market St., San Francisco, Calif.	(Approx.) 30,029.50

(Testimony of W. Boyd Stewart.)

Sub-Contractors—(continued)

Name		Value of Contract
U. Peira & Son 120 Broadmoor Dr., Daly City, Calif.		$ 15,000.00
Patent Scaffolding 270-13th St., San Francisco 3, Calif.	(Approx.)	14,463.71
Geo. W. Reed 1390 S. Van Ness, San Francisco, Calif.	(Approx.)	110,239.00
Thos. B. Spelman 600-16th Street, Oakland, Calif.		163,736.00
Steelform Contracting Co. 666 Harrison, San Francisco 7, Calif.		37,280.00
Turner Resilient Floors 68 Rincon, San Francisco, Calif.		93,572.00
Luther M. Warda 4150 Irving, San Francisco, Calif.		438,808.00
Western Fiberglas Supply Co. 739 Bryant St., San Francisco, Calif.		13,927.00
D. Zelinsky & Sons 165 Grove St., San Francisco, Calif.		163,241.00
Martin Ruane 232 Taraval St., San Francisco, Calif.		325,051.00

Received September 21, 1949.

Received in evidence July 5, 1950.

Q. (By Mr. Law): Now, Mr. Stewart, was the list of names, addresses and figures, or, were the lists appearing on General Counsel's Exhibit No. 2 prepared from the records of the Stoneson Development Corporation? A. They were.

Q. Were they prepared under your direction?

A. They were. [65]

(Testimony of W. Boyd Stewart.)

Cross-Examination

By Mr. Garoni:

Q. Mr. Stewart, how did you arrive at the figure of $10,000,000, please?

A. Estimating the cost of the construction work to be completed within the next two years.

Q. It isn't the construction work up to this point, is it?

A. No. It is as a part of the entire project.

Q. As a matter of fact, General Counsel's Exhibit No. 2, adding all those figures is nowhere near $10,000,000? A. That's right.

Q. I have summed it up to be about $3,688,000?

A. That's approximately what it adds up to, yes, that's a [72] part of the entire project.

* * *

Redirect Examination

By Mr. Law:

Q. General Counsel's Exhibit 2 lists the subcontractors, I take it. Does the Stonestown Corporation [74] subcontract out the entire job?

A. No, sir, they do not.

Q. They do part of the purchasing of materials and some of the work themselves?

A. They do, yes.

Q. All right. Now, just one other question I should have covered on direct. What was the approximate value of the lumber purchased by Stones-

(Testimony of W. Boyd Stewart.)

town Development Corporation for the project to date?

A. Approximately $385,000 worth of lumber.

Q. And from what company or companies, did you purchase that lumber from a number of companies? A. From about six companies.

Q. And did you purchase the major portion of it from a single company? A. Yes, sir.

Q. Now what was that company?

A. J. H. Pomeroy and Company, San Francisco.

Q. And what is the approximate value of lumber purchased from the J. H. Pomeroy Company?

A. $295,000.

Mr. Law: No other questions.

Recross-Examination

By Mr. Garoni:

Q. Does this lumber include some lumber to be used on the commercial project in the future? [75]

A. No.

Q. Do you have any impression at all how much of this material came direct to the project over the state line? A. No, I do not.

* * *

E. P. WRIGHT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Law:

Q. What is your business address, Mr. Wright?

A. 225 Bush Street, San Francisco.

Q. What is your business or occupation?

A. I am manager of the building design construction department for Standard Oil Company of California.

Q. For how long have you held this position?

A. A little over five years.

Q. Now what are your duties as manager of the building design and construction department for Standard Oil of California?

A. Largely to coordinate the design and construction of major building projects for the [76] Company.

Q. And are you, through that job, familiar with the company's major building project of the past five years and up to the present time?

A. Yes.

Q. And now by the company I refer to the Standard Oil Company of California. Is the Standard Oil Company of California now engaged in the construction of an addition to its main general office building here in San Francisco?

A. Yes, it is.

(Testimony of E. P. Wright.)

Q. And what is the nature of that addition?

A. Well, it consists of a twenty-two story addition to our present home office building at 225 Bush Street.

Q. When you speak of a twenty-two story addition, does that refer to added stories on top or beside?

A. Alongside. It's on the adjacent lot for the full length.

Q. And what is the approximate square footage of the new addition now under construction?

Mr. Stanton: I wish to interpose an objection at this time to this line of questioning on the ground that it is irrelevant, incompetent and immaterial, and on the further ground that it is not the type of testimony that does not bear on the type of connection with Interstate Commerce which the Board has held to be material.

Trial Examiner Ward: The objection will be overruled. You have the continuing objection the same as the Examiner [77] gave counsel for the union on all this type of testimony.

Q. (By Mr. Law): Can you answer the last question.

A. Well, it all depends on what the gross square feet would be. The lot is 68 feet 9 inches by 137 feet six inches.

Q. And there are twenty-two stories?

Q. There are twenty-two stories covering that entire lot.

Q. And are the stories each of the same area?

(Testimony of E. P. Wright.)

A. Each of the same area up to the nineteenth, then there is about a three foot step back on the Bush Street side and a smaller one on the other side.

Q. And now is the addition being put to use yet by the company?

A. It is partially occupied at the present time.

Q. And what is the nature of the use to which it is being put?

A. Well, this building is merely an enlargement of the Standard Oil Company's home office main headquarters and various departments occupy various floors, some in the new section, some in the old, some in both.

Q. All right. Now, I'm not interested in any confidential figures, Mr. Wright, but what is the approximate construction cost of the entire addition?

A. Well, I think I can safely say in excess of $6,000,000.

Q. And it is an essentially concrete structure with reinforcing steel or is it a steel structure with concrete or brick facing? [78]

A. Well, it is basically a steel structure with concrete walls, floors and with a terra cotta indented facing on the outside.

Q. Now approximately what was the value of the steel going into the structure?

A. I only know the value—the approximate value of the contract, and that includes the steel and to erect it and that is slightly under $900,000.

(Testimony of E. P. Wright.)

Q. Now was that steel manufactured in California, fabricated? A. No.

Q. Where was it fabricated?

A. It was fabricated in the east.

Q. When you use the term "the east" what do you mean?

A. Oh, basically east of the Mississippi.

Q. When did the construction of this building begin?

A. Just about two years ago; that would bring it about the middle of 1948.

Q. And how near completion is it now?

A. Oh, fairly close to 90 per cent.

Q. Has all the masonry work in the building been completed?

A. Substantially all of it.

Q. Was George W. Reed the masonry contractor?

A. Yes, subcontractor under the general contractor.

Q. Now, at any time during the construction of this building has the construction work been stopped for any reason? [79]

Mr. Garoni: I object as incompetent, irrelevant and immaterial.

Trial Examiner Ward: Sustained.

Q. (By Mr. Law): At any time during the construction has there been strikes of construction employees on the job or any of them?

Mr. Garoni: Same objection.

Trial Examiner Ward: What does General Counsel intend to prove by this line of questioning?

(Testimony of E. P. Wright.)

Mr. Law: I take it that this is a very legitimate part of the total background of the situation we have here. I intend to find out whether or not when some building construction workers walked off the job whether or not the construction is affected one way or another.

Trial Examiner Ward: The purpose of it all in the end is to prove that the Respondent Reed is engaged in Interstate Commerce, is that it?

Mr. Law: No, that he is engaged in business very definitely affecting Interstate Commerce.

Mr. Garoni: If there was a Labor dispute I don't see how it could be attributed to the Respondent Reed or the Respondent Union in this case. If there was a labor dispute involved it certainly couldn't be attributed to us.

Trial Examiner Ward: I am going to sustain the objection. You may make an offer of proof if you wish, Mr. General Counsel. [80]

Mr. Law: Well I will offer to prove then that if this witness is permitted to answer it would be established where during the construction of this building there has been a strike of building construction employees that that strike has affected the entire construction project on the building. I am referring particularly to a strike of carpenters which—this is not part of an offer of evidence, this is part of an offer of proof which happened on Monday, which, I believe, would be shown had a definite effect on the construction during that day. That strike was short lived.

(Testimony of E. P. Wright.)

Trial Examiner Ward: The record will show the offer. The ruling will be the same.

* * *

Cross-Examination

By Mr. Garoni:

Q. The approximate value of this entire job—do you have any idea of how much of this entire job is attributable to labor as distinguished from material? A. I have not.

Q. Do you have any idea what the total materials on this job, how much of those materials came across the State line?

A. No, I have not. [81]

* * *

Mr. Garoni: If the Examiner please, I would like to call them out of order. I would like to call my witnesses out of order at the present time.

* * *

JOE MURPHY,

a witness called by and on behalf of the Respondent Union, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Garoni:

Q. Mr. Murphy, on June 14th you saw Mr. Charlton at the Stonestown Project?

A. I did.

(Testimony of Joe Murphy.)

Q. What was the first time after that date that you again saw Mr. Charlton? [86]

A. A week or so later.

Q. Where was that?

A. Up in the Hall in the office.

Q. Just exactly what occurred on that day?

A. He came in and asked for a blue card for Unemployment Insurance. We asked him if he wanted to go back on the job. He said no, he wanted a blue card. We signed the unemployment blue card which is required by the California State Employment Service, gave it to him and gave him another citation as well.

Q. By another citation, make that clearer. What was the citation about, please?

A. Refusal to get a clearance and go on the job.

Q. Did you definitely offer to let him go back on the Stonestown job if he so wished?

A. We asked him to go back on there, to give him a clearance.

* * *

Cross-Examination

By Mr. Law:

Q. Mr. Murphy, I understand that you say that a week after the lay-off or the termination of Mr. Charlton's employment by Mr. Reed he came to your office for a blue card?

A. That's right. Approximately a week.

Q. For what purpose was that blue card?

(Testimony of Joe Murphy.)

A. Unemployment Insurance, the California State Unemployment Insurance demands that the union members that are seeking work. [87] On the blue card there is a date when they signed up when they were unemployed and also a date when they are dispatched so that when they go back to the Unemployment to draw the Unemployment Insurance they won't give them Unemployment Insurance if they belong to the union unless they come to the union and show they are working or they are seeking employment.

Q. As I understand it you asked Mr. Charlton at that time if he wanted to go to work?

A. Correct.

Q. Did you have work to offer him?

A. Yes, we had work to offer him.

Q. Did any work which you had to offer him require clearance through your organization before he could go to work?

A. All of the hod carriers come in because of the simple reason that there is a number of contractors running wild around over this area and they have judgments against them for wages, material and everything else. In order to clear our members to see they get their money they come in to get a clearance or else they call up and tell us they are on a job. They come in and get a white card which gives them immediate clearance, or call up, or come in themselves.

Q. If they don't get this clearance from your organization, what do you do?

(Testimony of Joe Murphy.)

A. We cite them before the Executive Board to explain why they must have the clearance. [88]

Q. What else do you do?

A. First time it's a reprimand. So far, the vast majority, there hasn't been any of them that has been fined in relation to—they can rustle their own job with any of the contractors or master plasterers or master masons. For instance, one small contractor or a contractor's gang is winding up and he calls up, "Transfer my gang for a few days or weeks over to so and so because I haven't any work for them." They automatically transfer over, because we have a number of contractors as far as the Labor Commission and the State of California is concerned it's never been in such *undeplorable* condition as at the present time.

Q. My question is, I will ask you directly, if the man fails or refuses to get a clearance through your union to keep his job as was the case of Mr. Charlton, do you go to the employer and attempt to get the man discharged?.

A. As a rule we don't have to. The individual sees the membership voted themselves. In the War Manpower days voted themselves to get a clearance or to see that the employer they were working for had Workman's Compensation, Social Security; and a number of the contractors who had done business in the City and County of San Francisco had collected withholding tax and never turned it in and disappeared. Unemployment Insurance money from them disappeared; Social Security

(Testimony of Joe Murphy.)

from them disappeared. For their own protection they come in and [89] find out about these contractors.

Q. Well, right now I will ask you again. If the man fails or refuses to get clearance do you go to his employer and attempt to get the man discharged? A. No, we don't need to.

Trial Examiner Ward: Just a moment, Mr. Witness, when you have answered don't go into other matters. Quit when you have finished the answer and wait for a further question. We have a lot of long responsive answers for the last two or three answers.

The Witness: All right.

Q. (By Mr. Law): You got Mr. Charlton discharged because he did not get the proper clearance from your Union, did you not?

A. No, we didn't get him discharged.

Q. You got him laid off.

A. Charlton laid himself off because he refused to take the citation.

Q. Did you talk to the employer and ask him to lay Charlton off?

A. I told the foreman the hod carriers weren't going to work with this individual until he did get a clearance.

Q. You do that with any other person who refused to or failed to get a clearance after proper warning?

Mr. Garoni: I object to that. It's immaterial.

(Testimony of Joe Murphy.)

It is in relation to this particular man and not to any other person. [90]

Trial Examiner Ward: This is cross-examination.

Q. (By Mr. Law): Those were the employment conditions which applied to any other work which you might give to Mr. Charlton? Is that correct? A. That's true.

Mr. Law: Thank you. No other questions.

Q. (By Mr. Stanton): Do you have one of these white cards with you? A. Yes.

Q. I have here a small white card which has on its face "Hod Carriers Union No. 36, affiliated with S. F. Building Trades Council," a space opposite the name and town of San Francisco. What goes in that blank?

A. Which blank is that?

Q. The blank opposite San Francisco.

A. Date.

Q. The next blank has the word "name" in front of it. What goes in there?

A. Name of individual.

Q. The next blank has the word "company."

A. Name of the company he is working for; employed by.

Q. The next blank shows "location."

A. Where, approximately, the job is.

Q. The next blank has "Business Agent" under it and on this card has the name "Joseph A. Murphy" stamped in on it. [91] That is your name, is it not? A. That is correct.

(Testimony of Joe Murphy.)

Trial Examiner Ward: I suggest the card be marked for identification as Respondent Reed's Exhibit 1 if it might become material at the end of the hearing.

Mr. Stanton: I was going to say I wanted to know just what—I thought it was important to have in the record just what this white card was in its form.

Trial Examiner Ward: The card itself will be better in the record than the questions and answers. We will give it Respondent Reed's Exhibit No. 1.

Mr. Stanton: I would say this, Mr. Trial Examiner, I don't intend to offer it as an exhibit as part of our case.

Trial Examiner Ward: The Examiner may decide to put it under his exhibits.

Mr. Garoni: At this time I didn't intend to go into the extent of securing clearance, I intended to call Mr. Murphy later in our case about that. I didn't intend to go into, at this time, other facts. I intend to call Mr. Murphy later on our case. May I recall him then, sir? And if Mr. Murphy is present?

Trial Examiner Ward: You may reserve the right to recall him. [92]

* * *

DILLY BELL,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner Ward: What is your name?

A. Bell.

Direct Examination

By Mr. Law:

Q. What is your full name for the record, Mr. Bell?

A. First let me—I don't want to waste your time and mine too. I can't speak with authority, with any authority for the company for which I work. I am a sales representative, you [93] knew that. I am not an officer or an official or anything else.

Q. I will ask you certain questions.

A. My name is Dilly.

Q. You are not Mr. Bell?

A. Yes. My first name is Dilly.

Q. What is your position?

A. Sales representative.

Q. Of what firm?

A. Ceco Steel Products Corporation.

Q. What is your business address?

A. 401 Tunnel.

Q. That's in San Francisco? A. Right.

Q. Your firm handles steel windows, does it not?

A. Yes, sir.

Q. Steel window frames? A. Yes, sir.

Q. Did you, in 1949, sell certain steel window frames to the general contractor for installation on

(Testimony of Dilly Bell.)

the Stonestown Apartment House Project?

A. We furnished and sold some windows out. I don't know whether it was in 1949 or not. I happen to work in another department of our company.

Q. I will ask you——

Mr. Garoni: If the Trial Examiner please, I don't mean [94] to interrupt, but may I ask for a continuing objection to this type of testimony?

Trial Examiner Ward: You have, throughout the entire hearing.

Q. (By Mr. Law): Where are your steel window frames manufactured A. In Chicago.

Q. Chicago, Illinois? A. Yes.

Q. Are any of them manufactured in California?

A. Yes, but I don't know whether any of the Stonestown windows were manufactured in California. We do manufacture some special windows in California.

Q. Where do you manufacture them?

A. We might put together a few or manufacture a few in San Francisco, but our main manufacturing plant is in Chicago. We might manufacture a few in Los Angeles, too.

Q. Are those largely on special orders?

A. Very special.

Q. In what proportion of your total product consists of the special orders manufactured in California?

A. Minute. One-half of one per cent, maybe, or practically none in percentages.

(Testimony of Dilly Bell.)

Q. Where do you obtain the steel for the windows which you manufacture in California? [95]

A. I don't know. My answer would only be a guess. I am not familiar with those details.

Q. Do you also handle steel forms for the erection of concrete structures? A. Yes.

Q. By "you" I refer to the firm. A. Yes.

Q. Where are those forms manufactured?

A. I don't know for sure.

Q. Are they manufactured in California?

A. I don't know that for sure. I couldn't state.

* * *

Trial Examiner Ward: How long have you worked for your present employer?

A. About six years. [96]

* * *

HARRY GIBBS,

a witness called by and on behalf of the Respondent Union, being first duly sworn, was examined and testified as follows:

Trial Examiner Ward: What is your name?

A. Gibbs, Harry.

Direct Examination

By Mr. Garoni:

Q. Is that G-i-b-b-s? A. Yes.

Q. Where do you live, please?

A. 462 Morse Street, San Francisco.

Q. Are you a member of the Hod Carriers Local No. 36? A. Yes, sir, I am.

(Testimony of Harry Gibbs.)

Q. What position do you occupy?

A. President.

Q. How long have you been president?

A. Eight years or better.

Q. How long have you been a member of that local?

A. I have been a member since 1926.

Q. Do you know Mr. Charlton, the Charlton party in this case? A. I do.

Q. Do you recognize Mr. Charlton in the [97] room? A. I do.

Q. Will you point him out, please?

A. He's back there, sir; right back there. Way back in the last seat.

Q. Thank you. On or about June 14, 1950—1949, excuse me, did you accompany Mr. Joe Murphy out to the Stonestown tract? A. I did.

Q. Did you see Mr. Murphy engaged in conversation with Mr. Charlton? A. Yes, I did.

Q. Were you able to hear any of the conversation?

A. No, I was in the car. Brother Romo passed away, he was with Brother Murphy.

Q. After that date of June 14, 1949, do you recall seeing Mr. Charlton again?

A. Yes, he come up in the office.

Q. About how long?

A. A week or so after.

Q. What occurred? In your own words, will you please tell?

(Testimony of Harry Gibbs.)

A. He came up there and asked for unemployment card, which Brother Murphy gives unemployment cards out, the blue cards.

Q. Who did he ask for the employment card?

A. For himself.

Q. I mean what person did he ask for?

A. Joe Murphy. [98]

Q. What did Mr. Murphy say, if anything, to him?

A. Brother Murphy said to him like this, "Don't you want—you want an employment card. What do you want with an employment card?" He said, "There's a job that you can go back on."

Q. What did Mr. Charlton say, if anything?

A. He said he'd think it over. So when he took —Murphy signed the card. Before he went away Murphy gave him another citation to appear before our Board.

Q. The citation was for what purpose?

A. Well, for the rules we have you know, he didn't live up to the rules of the organization and along with that—we cited him before our Executive Board.

Mr. Garoni: I have no further questions.

Cross-Examination

By Mr. Law:

Q. You testified that Mr. Murphy told Charlton he could go back on that job?

A. That's right.

(Testimony of Harry Gibbs.)

Q. Did he say what job?

A. Larry didn't say. I guess it was the job that he came off of. It was the job he came off of, I guess. That was the job he was referring to.

Q. You say Murphy told Charlton he could go back on the job that he had just gotten Mr. Charlton laid off from?

A. That's right. I couldn't say—the thing is I couldn't hear what was happening between him and Murphy on the job [99] but this was in the office. Murphy asked him.

Q. You heard everything they said there?

A. Yes.

Q. According to the rules of your organization could Mr. Charlton go back on the job without first clearing himself through your organization? In other words, were you prepared to forget the entire matter?

A. Yes. The whole thing is the man—if it is a misunderstanding he can go back. We don't hold nothing against a member for small causes and the like of that.

Q. It is your testimony that you and Mr. Murphy were prepared to forget all about the matter and waive the rules and let Mr. Charlton go back?

A. We don't waive no rules. The whole thing is we live up to our rules. We have our rules from our International organization and we make our own locals, but we handle the rules so as Brother Murphy said in which we have always protected this way, the employer too, there are so many em-

(Testimony of Harry Gibbs.)

ployers that have no Social Security, has no—they have bad ratings for checking—that's why we would have a clearance to protect our members that way.

Q. You testified before Mr. Charlton left Mr. Murphy gave him another citation?

A. That's right.

Q. Did Mr. Murphy say why he did that? [100]

A. Well, he didn't come up to—he didn't want to take the job so what is he going to do? He offered him a job. He didn't come in before, he didn't come before the organization. There is a man that's been in our organization I don't know how many—in my time, eight years I haven't seen him twice in the organization.

Q. He got this citation for being an unsatisfactory member, is that right?

A. No, for going by on the job. We didn't know where he was. We happened to run across him. He had been on a different job. We generally put the permits, you know, that they give out to a member to protect himself, as I said. A man that's contracting around, he's got no license; got no money; he gives you a bum check. There's been so many rubber checks.

Trial Examiner Ward: Just a minute, we can ask questions. Read the last question, please.

(Question read.)

A. He told him to appear before the Board.

Q. (By Mr. Law): Let me ask you this: In

(Testimony of Harry Gibbs.)

coming in to obtain this card for Unemployment Insurance had Mr. Charlton properly and adequately cleared with your organization for further employment on the Stonestown project?

A. Well, I couldn't say. The whole thing is he had been working out there. He asked him if he wanted to go back. I guess he was cleared then. [101]

Mr. Law: No other questions.

Q. (By Mr. Stanton): Mr. Gibbs, you said that Mr. Charlton had been a member of your organization for eight years, is that right?

A. I didn't. He'd been a member a good many years. I have been president for eight years.

Q. Do you know if he has been a member of the Union for that period? A. Yes.

Q. Is Mr. Charlton still a member of your Union? A. He is.

Q. In other words he has not been expelled, his membership has not been terminated, is that correct? A. No. [102]

* * *

Q. (By Mr. Stanton): Is there any reason why this white card would not have been issued to Mr. Charlton upon request at this meeting in the Union office a week after June 14th?

A. Which white card is that?

Q. The white card which is identified as Respondent Reed's Exhibit 1 for Identification.

A. You mean the one that clears the job?

(Testimony of Harry Gibbs.)

Q. I have in my hand a white card which has previously been identified for the record as Respondent Reed's Exhibit No. 1.

Trial Examiner Ward: For identification. [103]

Q. (By Mr. Stanton): For identification.

A. We always give a man a card like that that goes out on a job. Once you give him that card, that brother card like that on a job, that's good, if he quits or wants to go back again he can go on that same card.

Q. The question I have asked you, Mr. Gibbs, is was there any reason why such a card would not have been issued to Mr. Charlton at this meeting in the Union office a week after June 14th?

A. No.

Q. Was Mr. Charlton so informed?

A. Mr. Charlton was informed, yes.

Q. That he could have one of these cards for the asking for Mr. Reed's job, is that correct? [104]

* * *

Q. (By Mr. Stanton): This is a form, referring now to Respondent Reed's Exhibit No. 1 for identification, this is a card issued by the Union, is that right? A. That's right.

Q. Was there any reason, insofar as Mr. Reed is concerned, why the Union would not issue such a card to any man who had been employed by Mr. Reed? [105]

A. That's right. I'd give him a card.

Q. Was the Union satisfied that Mr. Reed was

(Testimony of Harry Gibbs.)

paying the hod carriers working for him?

A. What do you mean, the scale wages?

Q. I mean promptly and without hold back. You have testified, Mr. Gibbs, that the purpose of these cards is to protect hod carriers against contractors who do not pay their labor bills, is that correct? A. In one way, yes.

Q. My question is whether Mr. Reed was considered by the Union as a contractor who did not pay his labor bills promptly?

A. Oh no, no, no. I wouldn't say to that. He has been a very, very good contractor. [106]

* * *

Redirect Examination

By Mr. Garoni:

* * *

Q. At this meeting in the office about a week later from June 14, 1949, was there any discussion at all pertaining to a clearance card? A. No.

Q. Mr. Murphy just offered him a job?

A. How it came about he came up for his Social Security so we asked him if he wanted to go back to work again. He said he wanted his Social Security. He said he'd think it over. That's when we asked if he wanted to go back to work.

Q. You mean Social Security or Unemployment Insurance?

A. Unemployment, yes, sir, pardon me. Unemployment Insurance.

* * *

(Testimony of Harry Gibbs.)

Recross-Examination

By Mr. Stanton:

Q. Has the Union received any resignation from Mr. Charlton as a member of the Union?

A. No, sir.

Q. Either verbal or in writing?

A. No, sir. [107]

Trial Examiner Ward: Anything further of this witness?

A. (By Mr. Law): Who determines whether a man is entitled to a clearance for a job, Mr. Gibbs, do you or Mr. Murphy?

A. Mr. Murphy is the representative. He polices the outside, all the jobs.

Q. Is that one of Mr. Murphy's duties as a business agent of Local No. 36? A. Yes.

Q. To contact all jobs? A. Yes, sir.

Q. Where a man does not have a clearance is it part of Mr. Murphy's job to see that he gets a clearance if he stays on the job?

A. Well, the whole thing is that maybe the man has got a clearance a year or six months before. If he's still on that job he don't need another clearance.

Q. Is it part of Mr. Murphy's job to see that he gets a clearance if he stays on the job?

A. Yes, that's what he's got the clearances for. [108]

* * *

ALFRED LEVI

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Law:

Q. What is your name?

A. Alfred F. Levi.

Q. What is your business address, Mr. Levi?

A. 301 Mission Street.

Q. What is your position?

A. Salesman with W. P. Fuller and Company.

Q. As a salesman for W. P. Fuller and Company do you sell glass?

A. We sell glass, estimate glass from the plant and sell the glass and through the Fuller arrangement here in San Francisco we supervise the job until it is completed.

Q. Are you familiar with, or do you know of the Stonestown Apartment House Project in San Francisco? A. Yes, I do.

Q. Did you have any connection with that work out there?

A. Yes, we furnished all the glass out there. Furnished and installed all the glass, I might say.

Q. Did you personally have anything to do with that? A. Yes, I supervised the job.

Q. You supervised the installation of the glass?

A. Installation, yes. [110]

Q. All right. Did W. P. Fuller and Company supply the glass?

(Testimony of Alfred Levi.)

A. Yes, they had the contract to supply and install the glass.

Q. Now where did you obtain the glass which was installed at the Stonestown Apartment house project?

A. The window glass was supplied by the Pittsburgh Plate Glass Company from their plant in Henrietta, Oklahoma. The crystal glass, the heavy window glass, came from Clarksburg, West Virginia and there was some obscure glass supplied by Mississippi Glass Company, very likely from the St. Louis plant and a little plish wire glass supplied by Mississippi from their Fullerton plant.

Q. You say the St. Louis plant, where is the St. Louis plant?

A. It's a little town outside of St. Louis, Missouri.

Q. You mentioned the same company's Fullerton plant. Where is Fullerton?

A. That's in California.

Q. Approximately—have you now testified about all the glass supplied for the job?

A. That's all the glass in the job, yes, sir.

Q. Approximately what is the value of the glass supplied by the Fullerton, California, plant you mentioned?

A. I'd say, not having the figures with me, around $2,000.

Q. Approximately what is the value of all the other glass which you have mentioned?

(Testimony of Alfred Levi.)

A. In round figures around $48,000. [111]

Mr. Law: No other questions.

Trial Examiner Ward: The Union?

Cross-Examination

By Mr. Garoni:

Q. As of June 14, 1949, do you know of your own personal knowledge whether the glass for the Stonestown project was in the State of California at that time or not? A. Not all.

Q. How much would you say was in at that time?

A. That's hard to say without my looking at the records. You see, the way we do, we took that glass out of our stock as it was required and slowly brought it in as we required it.

Q. Was the glass here in storage in the State of California for this job at that time?

A. That's about a year ago. I'd say fifty per cent of it was.

* * *

Q. Was that glass shipped direct to the job?

A. No. All glass from any of our supplies goes to our warehouse first. [112]

* * *

(Witness excused.)

BRUNO LAURIE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Law:

Q. What is your position?

A. Assistant construction manager.

Q. For what company?

A. Otis Elevator Company.

Q. For how long have you held that position?

A. About three years now.

Q. Do you know of the Stonestown apartment house project in San Francisco?

A. Yes, sir, I do.

Q. Did the Otis Elevator Company supply certain elevators for that project?

A. Yes, we did.

Q. Elevators and related equipment? [113]

A. That's right.

Q. Where were those elevators manufactured?

A. We have plants at Yonkers, New York, and Harrison, New Jersey.

Q. Were the elevators manufactured at one or both of those two plants?

A. Well, the machine room equipment and the control equipment, it all is manufactured at the Yonkers, New York, plant. The cars, platforms and counterweights and so forth are all made at our Harrison, New Jersey, plant.

(Testimony of Bruno Laurie.)

Q. Mr. Laurie, one other question. Are you, or do you know of the Standard Oil Building annex on Bush Street? A. Yes, sir.

Q. Did your firm supply the elevators for that building? A. We did.

Q. How many elevators have you installed in that building?

A. Six elevators altogether in the adjoining.

Q. That is the building now under construction?

A. Yes. Six of them altogether.

Q. Mr. Laurie, I am not asking for any confidential figures, but what is the approximate value of the elevators and related equipment installed by your firm in the Standard Oil Building?

A. I don't think I could answer that because I don't even know, being in the construction end of it we are interested in one thing only, that is getting them in, and I don't even pay any attention to the figures. [114]

Q. Did these elevators, the six elevators being installed or are installed in the Standard Oil Building, also originate in New York and New Jersey?

A. That's right. The division is always identical in every job. We only have these two plants and they make all of the equipment.

Q. How many elevators did you install at the Stonestown project? A. Eight.

* * *

(Testimony of Bruno Laurie.)

Cross-Examination

By Mr. Garoni:

* * *

Q. Where did you get your information as to how many elevators were installed out there and all this information that you gave on direct examination?

A. Well, all contracts referring to installation go through my hands.

Q. You personally see these contracts?

A. I don't see them always, no, but I see all the abstracts of contracts which indicate the numbers and the types of equipment. [115]

Q. Did you see the contract with relation to the Stonestown job personally? A. Yes, I did.

Q. Did you see the contract in relation to the Standard Oil job, personally? A. Yes.

Q. Did you read the contract?

A. No, I didn't read it.

Q. Did you read the Stonestown contract?

A. I did not.

Q. How did you get this information then about——

A. Well, I am only interested in one thing as far as the contract is concerned, that is the number of elevators and the types. Those are the things that I pick out relative to completion and has to be ready dates.

Q. In a great many occasions that is merely

(Testimony of Bruno Laurie.)

told to you verbally by someone else, isn't that right?

A. Sometimes it is told verbally, but usually I check them over.

Q. You could have been told verbally on Stonestown project which was being done there, isn't that right?

A. Well, I don't think so. I think I knew it from the actual contract. [116]

* * *

Q. Do you know where the particular elevators in the Stonestown project came from, your personal knowledge?

A. Would you repeat the question?

Q. Do you know where the elevators in the Stonestown project came from?

A. Yes, sir, I do.

Q. Is that from your personal knowledge, not being told, or do you know?

A. I know actually they came from Yonkers and Harrison.

Q. What type of elevators were the Stonestown project?

A. They were button control elevators.

Q. I had reference to passenger or freight.

A. Passenger elevators.

Q. What capacity elevators? [117]

A. Offhand I couldn't answer that.

Q. You don't know? A. I don't know.

Q. Were you out on the Stonestown project?

A. Yes, I have been out there.

(Testimony of Bruno Laurie.)

Q. Don't know what type of elevators are out there?

A. Well, when we talk about capacity you might say 2,000 or 2,500.

Q. I mean in relation to persons, how many persons can ride the elevator?

A. I don't know offhand.

* * *

Q. How many elevators—in what buildings were these elevators installed out at the Stonestown project, were they installed in all the buildings, in other words?

A. To my knowledge they were installed in all the buildings, in the high riding buildings.

Q. I beg your pardon?

A. In my knowledge they were installed in all the high rise buildings.

Q. How many high rise buildings are there?

A. There is eight that I know of. [118]

Q. On the Stonestown project eight high rising buildings?

A. Pardon me, four, eight elevators.

Q. Eight elevators but four high rise buildings, is that what you are trying to say?

A. Yes. [119]

* * *

DONALD WHITTEMORE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Law:

Q. What is your name?

A. Donald Whittemore.

Q. What is your business address?

A. 333 Montgomery Street.

Q. What is your position?

A. Office Manager for J. H. Pomeroy and Company, Inc., general contractors, wholesale lumber distributors.

Q. For how long have you held that position?

A. For the past nine years.

Q. Do you know of the Stonestown apartment house project in San Francisco? [120]

A. Yes, I do. We supplied them some lumber.

Q. Approximately how much lumber in dollar value did your firm sell for the Stonestown development? A. Very close to $300,000.

Q. Do you know where that lumber came from?

A. Yes, it came from mills in southern Oregon and northern California and right on the border.

Q. Approximately how much of the lumber came from Oregon and how much came from California?

A. Well, we would figure about 60 per cent from Oregon and about 40 from California. It is impossible to tell with any degree of accuracy because many of the mills lie both in California and in

(Testimony of Donald Whittemore.)

Oregon, but we have always thought it was about 60-40 split.

* * *

Cross-Examination

By Mr. Garoni: [121]

* * *

Q. How do you know that 60 or 40 per cent, upon what do you base your judgment?

A. Well, about 60 per cent of the lumber comes from the mills in Oregon and about 40 per cent from the mills in California. It is very hard to determine the actual percentage because it comes from around the Grants Pass area which is southern Oregon. As I previously said some of the logging operations are in both states. They don't put a birth certificate on each log and say this is Oregon and this is California.

Q. You say generally the lumber that comes to your firm 60 per cent comes from Oregon and 40 per cent from California, of all the lumber supplied to you, is that right?

A. For this particular project. This was a special cutting. We had to get it from several different mills. One mill couldn't supply it all at the time.

Q. I was interested in knowing you arrived at those percentages. By what means, is it merely conjecture?

A. No, we took the invoices to the mills that lie in California and the invoices to the mills that lie in Oregon and that added up to about 60-40.

(Testimony of Donald Whittemore.)

Q. Did you specially handle these invoices yourself? [122] A. Yes.

Q. Do you know what the lumber was used out at the project for? A. I haven't any idea.

Q. You do know the project is not a substantially lumber project though? A. Yes.

Q. Was the type of lumber sent out there lumber used for forms and so on, concrete forms?

A. Rough lumber; I don't know what they used it for.

Q. From your general experience in the use of lumber for concrete forms, that lumber is also used in other jobs as well as the one particular job?

A. All construction jobs use it. [123]

* * *

Q. (By Mr. Garoni): On the date of June 14, 1949, do you know how much lumber had already been delivered out at the project?

A. I haven't any idea.

Q. Was a good portion of it delivered, can you estimate approximately?

A. I would say all of it or practically, that's just——

Q. Delivered by June 14th?

A. Nothing definite on that at all. It is not a fair question.

Mr. Garoni: No further questions.

Trial Examiner Ward: Some of the lumber cut in northern California processes in mills in Oregon?

A. Right. [124]

* * *

EDWARD H. KRUSE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Law:

Q. What is your business address?

A. 6247 College Avenue, Oakland.

Q. What is your position, your business or occupation?

A. Trustee for the L. J. Kruse Company, plumbing and heating contractors.

Q. For how long have you held that position?

A. 1946.

Q. Do you know of the Stonestown apartment project in San Francisco? A. Yes, I do.

Q. Did your firm, as a subcontractor, supply certain heating and plumbing equipment for that project? A. We did.

Q. Approximately what is the value of the heating and plumbing equipment you supplied?

A. The contract price for the project was in the neighborhood of about $780,000.

Q. Would you list or state briefly the general type of equipment which you did supply under this contract?

A. We did all the plumbing and heating work in the unit, in the project, which would consist of all the sanitary facilities in the building, plumbing-wise, and all the boilers, [125] all the heaters and

(Testimony of Edward H. Kruse.)

heating equipment and everything that goes into making the heating system in a project of that type.

Q. Do you know where the plumbing and heating equipment that your firm provided for the Stonestown apartment development was manufactured?

A. I know where the greatest amount of it was.

Q. Was some of it manufactured in California?

A. Yes.

Q. Was some of it manufactured outside of California? A. Yes.

Q. What proportion of the total equipment was manufactured outside California?

A. Roughly of the total contract price I would say 60 to 70 per cent was from out of State, dollarwise, that is. The rest was from within the State.

Q. The rest was from within the State?

A. Probably so.

Q. Did your contract price include certain labor costs as well as the equipment cost? A. Yes.

Q. What proportion of the total contract price would comprise labor costs?

A. Roughly 25 to 20 per cent, maybe 35 per cent.

Q. The rest would represent the material costs?

A. That's right. [126]

Q. What other States of the United States other than California was some of your material manufactured in, could you enumerate some of the items and tell us?

A. Cast iron soil pipe and fittings, mostly from Alabama. Steel pipe from Bethlehem Steel Corpo-

(Testimony of Edward H. Kruse.)

ration, I think it is from the east coast, Pennsylvania, I am not sure on that. A lot of the heating equipment from the boilers for instance came from Kewanee, Illinois. The heating units came from La Crosse, Wisconsin. All the plumbing ware, the fixtures, came from Detroit, Michigan. Some more from Chicago, Illinois, it's spread around quite a bit.

Mr. Law: Thank you, Mr. Kruse, I have no other questions.

Trial Examiner Ward: The Union may examine.

Cross-Examination

By Mr. Garoni:

Q. Do you know offhand how much material was to the job or within the State of California on June 14, 1949, approximately a year ago?

Mr. Malatratt: Or prior to that date?

A. Roughly about 50 per cent or in excess of 50 per cent.

Q. (By Mr. Garoni): Was the other 50 per cent that wasn't delivered to the job, was that in storage in California at that time?

A. Pardon me?

Q. Was the other 50 per cent not delivered to the job in storage in California before that date of June 14, 1949? [127]

A. Most of it was still out of the State.

Q. What was the type of plumbing work that you had to do particularly out there?

A. What type of plumbing work?

Q. Yes.

(Testimony of Edward H. Kruse.)

A. Plumbing work in the buildings, sanitation, installation of the fixtures, normal plumbing fixtures that you see every day in the week.

Q. Installation of pipes throughout all the big four main buildings?

A. All the waste pipes, all the water supply piping.

Q. How do you arrive at your figures that 60 to 70 per cent of this came from out of the State?

A. Well, I figured the job, I was on the job all the time, I signed the checks, I naturally have access to all of the invoices and in fact I would have a pretty good idea of what it amounts to.

Q. Did you ever sit down and try to figure out how much percentage each was one way or the other or are you just making up a wild guess?

A. Percentage in what manner?

Q. 60 to 70 per cent coming from out of the State? A. Yes, I figured it out.

Q. Just about when did you do that?

A. About an hour ago. [128]

Q. Before you came here?

A. That is right.

Q. Did you know you were going to be questioned on this before you came here on these figures? A. No.

Q. Why did you try to figure this out, how did you know what you were going to be questioned on?

A. I didn't.

Q. For what reason did you sit down and figure these percentages out then?

A. I went over the entire setup.

(Testimony of Edward H. Kruse.)

Q. What prompted you to do that?

A. Mr. Stewart of the development corporation said there would be a hearing here relative to contract prices and materials that went into the job.

Q. Did they tell you you would be questioned as to how much came from out of the State and all that? A. Probably did somewhat.

Q. You are not sure now?

A. I didn't talk to Mr. Stewart. [129]

* * *

GEORGE W. REED

a witness called by and on behalf of the Respondent employer, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Stanton:

Q. Mr. Reed, when did you first employ Mr. Charlton?

A. You are asking a question that goes way back. He worked for me about thirty years ago when I first employed him.

Q. When was the last time he was employed by you immediately prior to his last employment with you?

A. It was a week or ten days as far as I can remember before the incident at the Stonestown contract.

Q. Would you repeat that answer?

(Answer read.)

(Testimony of George W. Reed.)

Q. (By Mr. Stanton): I was referring to the employment prior to the last employment. [133]

A. I don't think Mr. Charlton worked for me in the interval between thirty years ago and up until just before this incident occurred.

* * *

Q. Under what circumstances did Mr. Charlton come to you in May of 1949?

A. Mr. Charlton was working for Harry E. Drake Company and Mr. Drake was low on work so he asked me if I could use Mr. Charlton and a bricklayer and an apprentice. I told him yes I can use them. He sent them to me and he was put to work, he was sent to my superintendent.

Q. What was the name of the apprentice that came with Mr. Charlton?

A. His name was Kettleman.

Q. What was the name of the bricklayer?

A. Green.

Q. When did Mr. Kettleman and Mr. Green leave your employ?

A. They left my employ to go back to Harry Drake Company [134] on or about June 21st, I believe.

Q. In what year? A. 1949.

Q. Was that at the request of Mr. Drake?

A. As far as I know, yes. It didn't come through me.

Q. You do know they did go to work for Mr. Drake, is that correct, Mr. Kettleman and Mr. Green? A. That is right.

(Testimony of George W. Reed.)

Q. On or about June 21, 1949?

A. That's right.

* * *

Q. Mr. Reed, did Mr. Charlton have—let me put this question. How many employees do you have who have been with you more than a year at the present time? [135]

A. I should say fifteen.

Q. When your requirements go below fifteen on what basis do you arrange your layoffs?

A. Well, I usually get a hold of some of my competitors and ask them if they want to take some of my men for a while.

Q. Whom do you select. On what basis do you select your men for layoff?

A. Usually on the basis of length of time they have been with me. The ones who have been with me the longest stay with me as the work decreases, which is natural.

Q. Referring to the incident that took place on June 14, 1949, can you tell the Trial Examiner what the effect of the removal of the four hod carriers other than Mr. Charlton from the job would have been on the project that you were engaged in?

Mr. Law: Object to the question. It is speculative. I think if there are facts which can be shown on this point I think it is entirely admissible. But——

Trial Examiner Ward: Objection will be overruled. The record shows the Witness is a contractor

(Testimony of George W. Reed.)

of long experience and we can treat him as being qualified to answer the question. He may answer.

A. Will you put that question again?

Mr. Stanton: Read it please.

(Question read.)

A. My business is strictly a subcontracting business. I [136] take a subcontract and I am responsible to go to the owner, the architect and the general contractor from whom I take the subcontract to perform the work. We also make and have a three months' negotiated wage agreement which gives us our scale of wages to be paid to the different trades. Therefore, if the four other men had been removed from the job it would have caused me to fall down on the performance of my obligation to the owner. It is simply a case of—when a man comes on a job we do not ask if he belongs to the Adventist Church or what lodge he belongs to or what Union, in fact, he belongs to. If he has a grievance with a Seventh Day Adventist church member on the job and they will refuse to work, I naturally am going to take the weak link out of the chain and straighten my job out. In this case there was a weak link and it had to be straightened out and in this present case the man was told he could come back to work as soon as he had straightened the weak link out; straightened himself out. Otherwise my job would have been tied up and the performance of my contract would have been imperiled.

* * *

(Testimony of George W. Reed.)

Cross-Examination

By Mr. Garoni: [137]

* * *

Q. What was your understanding with Mr. Drake as to how long these men, including Mr. Charlton, were to be with you?

A. The understanding was that most of the men can call them at any time. It may have been a day, it may have been two days, it may have been a week or two weeks until he called for his men.

Q. These men, so far as you were concerned, were they permanent employees or temporary to you, including Mr. Charlton?

A. Temporary.

Q. For what period of time?

A. Until Mr. Drake called them back.

Q. Do the hod carriers have to be particularly skilled in their business in any way?

A. They do.

Q. In what way. Would you describe, please. Give some instances. [138]

A. Well, they have to be skilled in their tempering of mortar, building of safe scaffolds and even in the wheeling of a wheel barrow full of bricks.

Q. Do you have any other source other than the Union to obtain these skilled men in San Francisco? A. In the locality, no.

Q. As a matter of fact you just have to go to the Union when you want those men?

A. That's right. [139]

* * *

(Testimony of George W. Reed.)

Q. When was the Stonestown job finished, Mr. Reed, that is your part of it?

A. Oh, the early part of this year, January or February of this year.

Q. And did you have certain of your hod carriers employed on the job until January or February of this year?

A. On and off. There was a lot of extra work that came up on the job after the major contract was finished. Putting in small retaining walls and curbs that made the job string out a lot longer than it ordinarily would have gone.

Q. When did your job at the Standard Oil Building start?

A. As close as I can remember, August of 1949.

Q. Did certain of your hod carriers who had worked on the Stonestown project transfer to the Standard Oil project?

A. They were transferred by the superintendent at the Standard Oil Company project, yes.

Q. I will ask you about certain individual names: Did you have employees as hod carriers at Stonestown whose names were as follows: J. Hunter. A. Right.

Q. R. Miers? A. Right.

Q. A. Sweeney? [140] A. Right.

Q. J. Sylvester? A. Right.

Q. P. Peterson? A. Right.

Q. Henry Kroll? A. Right.

Q. I will ask you if these individuals were trans-

(Testimony of George W. Reed.)

ferred by you, continued in your employ, on into the work at the Standard Oil Building?

A. They all did to my recollection except Henry Kroll.

Q. Were there any other hod carriers transferred to the Standard Oil Building?

A. Not that I remember.

Q. You testified that at the present time you employ fewer hod carriers than you did a year ago. Have you at all times since a year ago employed fewer hod carriers than you did a year ago?

A. No. It would fluctuate. Sometimes we may have fifteen hod carriers, and another time twenty and then it will drop down to ten or maybe it might be five, maybe.

Q. So that during the past year sometimes you have had more hod carriers than you did on June 14th of 1949, and sometimes fewer?

A. That's right. [141]

Q. As of right now it happens that you have fewer? A. Yes.

Q. When was the Standard Oil, or is the Standard Oil project completed, your part of it?

A. No, I still have men working on the Standard Oil.

Q. How many hod carriers do you still have on Standard Oil? A. Two hod carriers.

* * *

(Testimony of George W. Reed.)

Redirect Examination

By Mr. Stanton:

Q. How long has Gene Hunter been in your employ?

A. Ever since I have been operating as an individual and maybe five or six years prior to that.

Q. In other words five or six years prior to 1942, is that correct? A. Right.

Q. How long has R. Miers been in your employ?

A. Approximately the same length of time.

Q. How long has A. Sweeney been in your employ? A. About the same.

Q. How long has P. Peterson been in your employ? A. Approximately three years. [142]

Q. As of the present time? A. Yes, sir.

Q. How long has Sylvester been in your employ?

A. The last twenty-five years—I am getting old.

Q. How long has Henry Kroll been in your employ?

A. Henry Kroll does not work steady for me. He is on and off. He likes to work for me a while then he gets sore at me and quits and then he comes back again. He is on and off all the time.

Q. For any extended period of years has he been on and off with you?

A. No, just when he feels like it. But if he feels like working for me again he comes back and gets a job.

(Testimony of George W. Reed.)

Q. He was not transferred from Stonestown to the Standard Oil Building, is that correct?

A. I believe he left Stonestown of his own accord before Standard Oil started.

Q. Did Mr. Charlton ever speak to you about putting him back to work after June 14, 1949?

A. Never did.

* * *

Recross-Examination

By Mr. Garoni: [143]

* * *

Q. So, what you do know, was anyone actually taken off of that job, did any of your men lose their employ outside of Mr. Charlton, or quit your employ, that is?

A. No, not according to their pay checks. They all received full checks so they must have worked.

Q. Every man continued working so the job was not stopped? A. That is right.

Q. Was any other job affected upon that date?

A. No other job.

Q. Do you know how Mr. Green or Mr. Kettleman came to leave you on June 21, 1949?

A. It is the policy of Harry Drake to call the men up in the evening and tell them he wants them the day after tomorrow or something like that and they simply notify my foreman that Harry called them and they go back to work for Harry. [144]

* * *

Mr. Law: Mr. Examiner, we have been off the

record in an effort to arrive at some stipulation which would shorten the duration of this case and obviate the necessity of calling another witness or other witnesses, which would at the same time allow each party to preserve his record as to certain factual points while also making a record upon which you or the Board can make findings of fact. With those thoughts in mind, and as a result of the conversations which we have had [146] mutually and the conversations which each of us has also had with a Mr. Wescott, the manager of the San Francisco branch of Barker Brothers, whose main office is at 711 South Fowler, Los Angeles, I propose the following stipulation.

In lieu of the taking of further testimony:

First that if Mr. Wescott, the manager of the San Francisco branch of Barker Brothers were called here to testify he would testify that the figure of $342,574.88 appearing as the value of Barker Brothers subcontract on General Counsel's Exhibit No. 2, represents Barker Brothers' price, Stonestown Development Corporation, but not necessarily the cost to Barker Brothers of stoves, refrigerators, cabinets and possibly certain sink attachments installed in the apartments at Stonestown apartment project, and that all of the stoves, refrigerators and cabinets were manufactured outside of the State of California.

I propose the further stipulation that Mr. Wescott would testify that he has not personally supervised the purchasing or the installation of the appliances I have mentioned at the Stonestown apartment project but that he has gained his knowledge

about which I propose the stipulation in his capacity as manager of the San Francisco branch of Barker Brothers.

I propose that stipulation which I hope I have correctly stated.

Mr. Stanton: The employer will so stipulate.

Mr. Garoni: May we go off the record just a moment, please? [147]

Trial Examiner Ward: Off the record.

(Discussion off the record.)

Trial Examiner Ward: On the record.

Mr. Garoni: Mr. Trial Examiner, the Union stipulated to that with the modification and additions that in this instance it does not represent the cost to Barker Brothers, we meant to say that does not represent the out of State cost of these appliances to Barker Brothers, and further that Mr. Wescott, if on the stand would testify that he does not know how many of these appliances were delivered to the job, Stonestown job as of June 14, 1949, nor does Mr. Wescott know how much or how many of these appliances were in storage in the State of California as of June 14, 1949, but he does know that some were delivered and some were in storage but the quantity he does not.

Mr. Law: I will join in the stipulation with the additions and modifications mentioned by Mr. Garoni.

Trial Examiner Ward: Is that acceptable to all parties as modified by the Union?

Mr. Stanton: The Respondent employer joins with the modifications, too.

Mr. Law: Yes.

Mr. Stanton: Yes.

Mr. Garoni: Yes.

Trial Examiner Ward: The record will so show that the [148] stipulation is accepted as agreed by Counsel.

* * *

Mr. Garoni: I am eliminating one thing. I am sorry this has to be brought up again. I did want to state that the Union does not stipulatate as to the truth of these facts but Mr. Westcott would so testify.

Trial Examiner Ward: If he was called as a witness he would so testify, that is what the stipulation provides.

Mr. Garoni: Thank you. [149]

* * *

HARRY E. DRAKE

a witness called by and on behalf of the Respondent Reed, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanton:

Q. What is your name?

A. Harry E. Drake.

Q. What is your business address, Mr. Drake?

A. 666 Mission Street.

Q. What is your business?

(Testimony of Harry E. Drake.)

A. Masonry contractor.

Q. Do you know Ernest Sydney Charlton, who is the complaining party in this proceeding?

A. Yes, sir.

Q. Has he ever worked for you?

A. Yes, sir.

Q. During what periods has he worked for you?

A. He has worked off and on for forty years.

Q. Did he work for you during 1948?

A. Yes.

Q. For how long a period? [150]

A. I brought a time book along to see. I haven't '48 here but he worked, I think, the greater part of 1948 for me.

Q. Did he work for you any part of 1949?

A. Yes.

Q. What part?

A. Well, the week ending January 6th on a Thursday, that's the earliest I have. That brings us back to about the first of January, 1949.

Q. Did he work continuously from then on until May of 1949?

A. Yes. I think until the 11th of May, according to the time book.

Q. Under what circumstances did he leave your employ at that time?

A. I sent he and two bricklayers to George Reed's job.

Q. What were the names of the bricklayers?

A. W. Kettleman and Raymond Green.

Q. When you say you sent these men to George

(Testimony of Harry E. Drake.)

Reed's job did you have any conversations with them concerning that transfer?

A. I judge I did. Reed needed bricklayers and I could spare them so I agreed to send them over at a certain time and I did. It was okay by them.

Q. When did—have you employed Mr. Charlton since that time? A. No.

Q. Have you employed Mr. Kettleman since that time? [151] A. Yes.

Q. When did he come back to you?

A. June 24th.

Q. Did you give him a regular job at that time?

A. Oh, yes, I put him back to work.

Q. When did Mr. Green return to you?

A. On June 24th.

Q. Did he receive a regular job at that time?

A. Yes.

Q. What project were you working on at that time?

A. The Reardon School, Reardon Boys' High School.

Q. Had that project just started up?

A. Yes.

Q. Was that the occasion for obtaining the return of Mr. Kettleman and Mr. Green?

A. Yes, sir.

Q. Was there a position at that time for a hod carrier on this project?

A. Yes, we were hiring hod carriers as we needed them.

Q. If Mr. Charlton had applied to you for a

(Testimony of Harry E. Drake.)

position as hod carrier, would you have hired him?

Mr. Law: Object to the question, it is speculative.

Trial Examiner Ward: Overruled.

Mr. Stanton: You may answer, Mr. Drake.

A. Yes. [152]

Q. (By Mr. Stanton): Is it your custom, in a situation such as you have described, to call back men that you have sent to another masonry contractor as soon as you have a job for them to fill?

A. Yes. We have agreed on that when we send the men.

Q. Had you agreed with Mr. Reed on that in this case? A. Yes, sir.

Q. Did Mr. Charlton apply for employment with you at any time since June 14, 1949?

A. I don't—he didn't ask for employment, no.

* * *

Cross-Examination

By Mr. Law:

Q. Did you call Mr. Charlton back when you needed him again after June 14, 1949?

A. No.

Q. Did you call Kettleman and Green back?

A. No. I notified Reed that I wanted the men.

Q. He let them return, did he?

A. Did you want me to explain?

Q. Yes.

A. Well, I notified the men, I think probably called them [153] up and spoke to Mr. Reed that I wanted my men back. But in the meantime I think

(Testimony of Harry E. Drake.)

I met Mr. Charlton on the street and he told me that there was some trouble. I heard about the trouble anyhow, at the job. He told me that he could not go to work. I hadn't asked him to go to work but they told me that he had been unable to go to work. He had worked for me off and on for years, you see.

Q. Did he say why he could not go to work?

A. Trouble with the Union. I can't just remember the words he used.

Q. Do you hire your men through the Union when you put on new employees?

A. Practically all of them are hired through the Union.

Q. Do you—if you don't hire the man through the Union do you require that the Union give him a clearance or approval before you let him continue?

A. I don't as a rule hire them that way unless they are men that have been working for me, laid off for a week or two. Then I call them up and have them come back, as long as they are in my employ. But when I need a new man or if a man has been gone, went to work for somebody else, I call up the Union Hall and ask for whatever I want.

Mr. Law: No other questions. Thank you.

Trial Examiner Ward: Redirect, if any.

Redirect Examination

By Mr. Garoni:

Q. The day you met Mr. Charlton on the street,

(Testimony of Harry E. Drake.)

Mr. Drake, please, did he ask you if you would take him back despite his Union trouble?

A. No, I don't think so. It was just a conversation. I had heard of the trouble myself. We just met down by the Builders Exchange. I think we passed the time of day. I couldn't remember what was said.

Q. As a matter of fact can't a man approach you with a request for his job regardless of the Union? Hasn't the Union permitted that?

A. I can't answer the questions because——

Q. Haven't some men come to you and asked you for work regardless of the Union? A. Yes.

Q. The Union has not objected to that procedure? A. No, I guess not. [155]

* * *

Trial Examiner Ward: Call your next witness.

Mr. Stanton: Call Mr. Charlton.

Trial Examiner Ward: The Witness has been heretofore sworn.

ERNEST SYDNEY CHARLTON

recalled.

Direct Examination

By Mr. Stanton:

Q. Mr. Charlton, what is your home address? [156] A. My name?

Q. Home address. A. 1387 Third Street.

Q. How long have you been a member of the Local No. 36 of International Hod Carriers Union of America?

(Testimony of Ernest Sydney Charlton.)

A. I joined the Union in August, 1906.

Q. Have you been a member of the Union continuously since that time?

A. Yes, practically continuously. One time I was out from 1915 to 1916 when I got injured. I couldn't work for about twelve months with my head injuries. Then I was reinstated at half the amount in 1916.

Q. Have you been continuously a member of that Union?

A. Yes, I have always carried a card in San Francisco since.

Q. Are you still a member of that Union?

A. They wouldn't accept my dues when I wanted to pay them so naturally after a certain time you are out of the Union. They wouldn't accept any pay from me.

Q. Have you been notified of your expulsion from the Union?

A. I wasn't notified that I was expelled or anything about it; I sent in my dues to them and they returned the money to me. I sent in a money order registered letter.

Q. But you have never been notified that you had been expelled from the Union, is that correct?

A. They didn't notify me that I was expelled. [157]

Q. Do you still have your Union card?

A. Mr. Malatratt has the one paid up to the 30th of June. [158]

* * *

(Testimony of Ernest Sydney Charlton.)

Q. I have here a book which bears the title "Membership Book International Hod Carriers, Building and Common Laborers Union of America, Local No. 36."

It has the number 394 and certifies that Sydney Charlton has been duly initiated a member in Hod Carriers Building and Common Laborers Local Union No. 36 of International Hod Carriers Building and Common Laborers Union of America, located in the City of San Francisco.

I will ask you, Mr. Charlton, whether that is your evidence of membership in Local No. 36?

A. That's all I have is the book that they gave me.

Q. That book is still in your possession, is it not?

A. I still have it; that is still my book.

Q. Have you submitted a resignation to Local No. 36?

A. I haven't resigned from it at all. [160]

* * *

Q. Had you previously been employed by Mr. Harry Drake?

A. Yes, I had worked for Harry Drake different times off and on, yes.

Q. Did you work for Mr. Drake during the major part of the year 1949 prior to May?

A. Yes. I worked for Drake.

Q. Did you work for Mr. Drake during the major part of the year 1948?

A. I worked in '48 for Mr. Drake, yes.

(Testimony of Ernest Sydney Charlton.)

Q. Did you work for Mr. Drake during the major part of the year 1947?

A. Probably yes, I think I did.

Q. Did you work for him in 1946?

A. I couldn't say whether I did or not. I may have and I may not, because I worked for a lot of other bosses. I don't know just exactly when I worked for him.

Q. It is your testimony that during 1947, 1948 and the first part of 1949 up to May you worked substantially continuously with Mr. Drake, is that correct?

A. Yes. The last job I worked for him was for the Federal [161] Government on the Oakland Air Base.

Q. Was anything said to you at the time, by Mr. Drake, at the time that you left him to be employed by Mr. Reed?

A. No, he just told me he had gone out of his work, the same as he had told me countless other times, that his work was getting cleaned up and that he didn't have any. That Reed and those had most of the work and you can always get a job with those people and you can easily get work but sometime in the future I would like to have you back working with me again, the same as you worked on other occasions.

Q. How did you happen to get a job with Mr. Reed?

A. I knew the superintendent, know him, worked with him off and on oh, for—occasionally for about

(Testimony of Ernest Sydney Charlton.)

eighteen or twenty years, John Dikerman. So I went up to his office where he hires men for Reed, the same as the superintendents do and foremen hire them, I went up to him and asked him for a job and he signed me up.

Q. What is the name of this gentleman?

A. John Dikerman. I don't know how you spell that, but he is the superintendent now for Reed. One time when I worked with him he was a bricklayer, sometimes foreman.

Q. Did you work any part of the day of June 14, 1949?

A. Yes, I worked up until about 11:00 o'clock.

Q. What occurred at 11:00 o'clock?

A. Well, Murphy came on the job and talked with some of the [162] bricklayers while I was building this scaffold. Then he walked away and went over to see Pat McDonough, the foreman. When he went away Ray Green come to me and said "Murphy's going to have you put off the job, and if Pat won't fire you he's going to pull the men off the job, the other hod carriers, and tie the job up."

Q. Did Murphy talk to you?

A. He never did.

Mr. Garoni: I object to the latter part of that statement as hearsay evidence, on the basis that Mr. Murphy would tie the job up.

Trial Examiner Ward: Overruled. The answer may stand.

Q. (By Mr. Stanton): Did Mr. Murphy talk to you?

(Testimony of Ernest Sydney Charlton.)

A. He didn't talk to me. He went over to where Mr. McDonough was, the foreman, came back with with Mr. McDonough and Pat walked up to my—up to me and said, "Syd, Murphy says I've got to lay you off." "And I said I would give you until 12:00 o'clock and you'd better knock off and leave." Or he said, "I'll give you until 12:00 o'clock" and it was 11:00 o'clock and he would pay me until 12:00. Give me one hour. He didn't have to give me the extra hour. If he would have fired me I would have been paid off at 11:00 o'clock.

Q. Did you have any further conversation with Mr. McDonough?

A. No more talk to him. I didn't say a word to him. I says, "Okay," or something like that. [163]

Q. I am referring to Mr. McDonough, not to Mr. Murphy.

A. That was Mr. McDonough.

Q. So you had no further talk with Mr. McDonough?

A. No more talk after that. But Joe Murphy stepped up then and passed me a card. "Citation," he said; "Citation." That was all. I asked him no questions; he said nothing more. [164]

* * *

Q. Did you leave the job at noon on June 14th?

A. I left about 11:00 o'clock. As soon as Pat told me I was ordered to be put off the job.

Q. Did you return to the job at any time after that?

(Testimony of Ernest Sydney Charlton.)

A. No, I didn't, because I was fired and that was the end of it. [165]

Q. Did you go to Mr. McDonough at any time after June 14th and ask to be put back to work?

A. To whom?

Q. Mr. McDonough, Mr. Reed's foreman.

A. I didn't ask him to put me back.

Q. You have never since June the 14th applied to Mr. McDonough for reemployment, is that right?

A. No, I didn't. I was fired off the job. When you are fired——

Trial Examiner Ward: You have answered the question. Just wait, don't volunteer any information.

Q. (By Mr. Stanton): What did you do following June 14th for the purpose of finding reemployment?

A. I looked on some jobs anywhere where there was a vacant lot getting excavated or anything.

Mr. Law: Mr. Examiner, I think that ordinarily this sort of material is reserved for subsequent ruling.

Trial Examiner Ward: For the purpose of this hearing it will be presumed that the Witness received work of the same type that he had after. It is a matter that can't be litigated at this time, it is a matter for compliance in the event he was ordered back to work and it has to be worked out further. So for the purpose of this hearing it will be as-

(Testimony of Ernest Sydney Charlton.)

sumed he has received employment of the same character that he had.

Mr. Stanton: In other words, Mr. Trial Examiner, so I [166] might understand, any questions relating to any employment insurance that he may have sought or any efforts to find further employment will not be admitted at this time, is that correct?

Trial Examiner Ward: That is right. It is a matter that has to be taken care of later and it is usually taken care of through the compliance because it might be six months or it might be a year before it would have to be determined.

Mr. Stanton: I have this further question relating to the character of his employment.

Q. (By Mr. Stanton): Mr. Charlton, after the incident of June 14th, did you go to Mr. Drake and seek reemployment?

A. No, because it is supposed to be you have to hire through the Hall. You've got to go through Murphy, he's got to send you on the job.

Q. You did not go to Mr. Drake and ask for employment?

A. I didn't go to him and ask for any more because I didn't see how he could put me on.

* * *

Cross-Examination

By Mr. Garoni: [167]

* * *

Q. Going out to the Stonestown project now on

(Testimony of Ernest Sydney Charlton.)

June, 1949, did you hear what Mr. Murphy had to say to the bricklayers? You said he was talking to them.

A. No, they talked to him while I was building the scaffold.

Q. You weren't within hearing distance?

A. No, I don't know what they said or what he said to the bricklayers.

Q. Did you hear what Mr. Murphy told Mr. Pat McDonough in relation to yourself?

A. I didn't hear that. He talked to him separately.

* * *

A. No, he didn't say come back to work.

Q. Did Mr. Murphy say that you should get off the job, to you personally?

A. He didn't say it; the other man did the firing. [169]

* * *

Q. Isn't it a matter of fact that Mr. Murphy has permitted you to rustle jobs at any time?

A. I have been rustling for forty-four years.

Q. Without going through the Union first?

A. Yes, without going to the Union. I rustle my own jobs.

Q. As a matter of fact that is the way you got your Drake job, isn't it?

A. Well, I was out on my own jobs. I hired out on them.

(Testimony of Ernest Sydney Charlton.)

Q. You got the Drake job without Mr. Murphy's intervention? Let me put it a little differently; you got the Drake job without going to ask Mr. Murphy for the job, isn't that right?

A. A long time ago.

Q. Yes, originally.

A. Three or four years ago, yes.

Q. Did you get the Stonestown job the same way without going and asking Mr. Murphy about the job?

A. Yes, I went to work. I asked Mr. Dikerman. [170]

* * *

JOE MURPHY

a witness called by and on behalf of the Respondent Union, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Garoni: [172]

* * *

Q. Is Mr. Charlton still a member of the Union at the present time? A. Yes.

Mr. Law: Please note my objection again to the materiality.

Trial Examiner Ward: It will be overruled and you have a continuing objection.

Q. (By Mr. Garoni): Mr. Charlton testified that he sent in his dues and they were refused. Will you explain what happened?

A. Yes. It is customary in relation to Unions when an individual is cited for something or when

(Testimony of Joe Murphy.)

he is fined that before his dues can be accepted that he must pay that fine or appear before, on the citation, whatever the citation happens to be.

Q. This is a rule that is an internal rule applicable to everyone alike in the Union?

A. Yes. Practically all Unions have the same rule.

Q. What is Mr. Charlton's status insofar as the dues are concerned at the present time?

A. Well, like any other individual that sends their dues in at the advice of some unknown party we have always kept them on the books until they did appear before the Board. [173]

Q. By that you have kept him on the books, would you explain that, are his dues paid or not paid?

A. His dues are paid, that is to the extent that he is on the Local books as well as International books.

Q. How is his dues paid?

A. Out of the Local's own fund. [174]

* * *

Q. I would like to go back to the Stonestown project on June 14, 1949, again. When you were out on the job did you stay around to see that Mr. Charlton got off the job?

A. No, I left because I had other territories to cover.

Q. Did you actually see whether he got off the job or not? A. No, I did not.

* * *

(Testimony of Joe Murphy.)

Cross-Examination

By Mr. Stanton:

Q. Did you in the course of this conversation with Mr. McDonough on June 14th tell Mr. McDonough that Mr. Charlton was not a member of the Union? A. No.

Q. Did you tell Mr. McDonough that Mr. Charlton was not in good standing with the Union?

A. No.

Q. This clearance that has been referred to, was that a matter which Mr. Charlton could have straightened out with the Union? A. Yes.

Q. How would he have proceeded?

Mr. Law: Object to the question as calling for a speculative answer.

Mr. Stanton: Mr. Trial Examiner, the purpose of my question [175] is to find out what the significance of this particular dispute is. What Mr. Charlton had done wrong in the eyes of Mr. Murphy that justified Mr. Murphy's action on that date.

Trial Examiner Ward: The objection will be overruled, subject to a motion to strike as a number of objections have been.

Mr. Law: In addition I would like the record to show that I consider the matter immaterial and object to it on that ground.

Trial Examiner Ward: You have a continuing objection on that ground.

Q. (By Mr. Stanton): What was the basis of your objection to the continued employment of Mr. Charlton?

(Testimony of Joe Murphy.)

A. There wasn't any objection to his continued employment. The objection was to the extent that he must get a clearance if he were to go right back to work on the same job. He could have gone right back to work on the same job.

Q. What was the clearance you refer to?

A. The clearance that you were shown this morning.

Q. How does one go about to obtain it?

A. Either by calling up or by coming into the Hall direct or have the foreman or the contractor himself to call up.

Q. Is such a clearance issued as a matter of course upon such telephone calls?

A. That's right. We generally take the clearance right out [176] to the job and give it to the steward on the job when they call in for it.

* * *

Redirect Examination

By Mr. Garoni:

Q. Does the Union have any objection to Mr. Charlton's going to work tomorrow if he wants?

A. He could have been working all yesterday and today for that matter.

Q. Could he have gone to work immediately the next day on any job that he wanted after June 14th or even on June 14th?

A. He could have stayed or remained on the job and I didn't remove him from the job on June 14th.

(Testimony of Joe Murphy.)

He was told to get a clearance and be blew his top and went dashing off the job and got in an argument with the foreman, as far as I can see. [177]

* * *

Mr. Law: Mr. Examiner, with the indulgence of the other parties, with whom I have discussed the matter, and of yourself, I would like, before calling Mr. Charlton as a rebuttal witness, to propose a stipulation, which I will read as follows:

The Respondent, George W. Reed, is now and for the past nine years has been a member of the Mason and Builders Association of California, Inc., an incorported association of approximately 40 employers engaged in masonry, contracting, and related construction activities in Northern California. The Mason and Builders Association of California, Inc., has for the past several years, and the present time, had collective bargaining contracts with the International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, covering hod carriers employed by members of the said Association, including George W. Reed. These contracts have been, and the present contract is, on a multiple employer basis through the Association.

That ends my proposed stipulation of facts. It is my understanding that the other parties don't dispute the facts and will stipulate to them, but do question the materiality of the matter. [181]

Mr. Stanton: The employer, Respondent Reed, will stipulate that, if called, Mr. Reed would testify

to the facts set forth in Mr. Law's statement. The Respondent objects to the introduction of such testimony, on the ground that it is incompetent, irrelevant and immaterial to this case. This case involves an alleged act of discrimination, which is not attributed to the Association referred to in that statement, and is not the result of the application of a common laborer policy by the Association on behalf of its members. It has no material bearing on the charge that is before this Trial Examiner.

Mr. Garoni: I also object to the admission for the Union of this stipulation. I think the facts will bear the stipulation out, however, but I also say the Association is not a party to this complaint, and at the end of this hearing to bring in the Association or attempt to bring in any facts relating to the Association is entirely irrelevant, immaterial, and incompetent.

Trial Examiner Ward: The objections will be overruled, subject to the proviso that there may be at the end, at the close of the hearing, a motion to strike by the parties, and under those circumstances the record will show the stipulation agreed to, except as noted by the statement of counsel for Respondent Reed, and counsel for Respondent Union. [182]

* * *

ERNEST SYDNEY CHARLTON

a witness called by and on behalf of the General Counsel, National Labor Relations Board, having been previously duly sworn, was examined and testified as follows:

Mr. Garoni: I am informed by Mr. Joseph Murphy, the Business Representative of the Union, that there was no agreement in operation—this agreement was not in operation as of June 14, 1949, the date of this dispute. There was no agreement at that time.

Trial Examiner Ward: At the conclusion of the testimony of the witness on the stand, we will take that item up.

* * *

Direct Examination

By Mr. Law: [183]

* * *

(The document heretofore marked General Counsel's Exhibit No. 4 for identification, was received in evidence.) [186]

* * *

GENERAL COUNSEL'S EXHIBIT No. 4

Bay Area Conference of Hod Carriers
200 Guerrero St., San Francisco, Calif.

Clearance Card

This card must be deposited with representative before going to work. In San Francisco, deposit this card at 200 Guerrero St., MArket 1-1806, with Joseph A. Murphy, Business Representative.

(Testimony of Ernest Sydney Charlton.)

In Alameda and Contra Costa County deposit this card at 2111 Webster St., Oakland, Calif., GLencourt 1-2474. Business Representative, James H. Pratt.

In Santa Clara County deposit this card at 72 N. Second St., San Jose, Calif. Ballard 4552. Business Representative, H. W. Freel.

In San Mateo County deposit this card with M. B. O'Connor, 723 B Street, San Mateo, Calif. Phone San Mateo Diamond 3-3775.

Citation

Dated: June 29, '49.

Name: S. Charlton.

Member of Local No. 36.

Employer .....

Location of Job .....

Signed: Joseph A. Murphy.

July 18—9 p.m.

[Union Label]

Received in Evidence July 7, 1950.

(Testimony of Ernest Sydney Charlton.)

Q. (By Mr. Law): Now, while you worked for Mr. Reed at the Stonestown Project, what work did you do? A. Well,——

Q. What jobs?

A. I did scaffolding, built scaffolding around garages that are built of Hedite blocks, a kind of a concrete block.

Q. What other type of work, if any, did you do?

A. I did neveering on some of the houses, built flower pots; that is, walled with brick around, and you put flowers in the center. And stacks.

Q. I am asking you now to enumerate the different types of work you did. [187]

A. That was about all there was on that particular job.

Q. You mentioned "stacks." What do you mean by that?

A. That is the chimneys to the boilers, the Kewanee boilers they put in there. They built a stack, I think it is, about three-foot, six square. It goes up three story buildings and it has a pitched roof on it, about a 6-foot pitch, and then you go up two foot higher than the pitch of the house.

Q. Did you work on those?

A. Yes, and I built the scaffold all around. I put a scaffold on four sides.

* * *

(Testimony of Ernest Sydney Charlton.)

Cross-Examination

By Mr. Garoni: [188]

* * *

Q. Is this question correct: Aren't you [190] required to go to the Union to have this card stamped every week just so that the unemployment insurance people will know that you are seeking a job and not trying to get unemployment insurance without looking for work?

A. Yes. Lots of times Mr. Murphy is not at the Hall, as you have a fixed time to go to the Unemployment, and when he wasn't there, I waited for him and he didn't show up, so I went down to the Unemployment People and they paid me off when I told them that Murphy wasn't there to sign [191] it.

* * *

Q. (By Mr. Stanton): Mr. Charlton, did you tell the Department of Employment that you were a member of Local No. 36 of the Hod Carriers' Union?

A. Yes. That is when I signed. I had to show them and sign it. That is why they sent me to get the blue card. I couldn't draw unemployment without the blue card, they said.

Q. What was the reason you gave to them for being out of work?

A. I signed a card that I was taken off the job by orders of Joe Murphy, the Business Agent, that he ordered the foreman to fire me.

(Testimony of Ernest Sydney Charlton.)

Q. Is that all you told them as your reason for being off the job?

A. That is about what I can remember. It is still on the card. They have the card what I wrote. [194]

* * *

Q. Did you report to the Union Hiring Hall for the purpose of obtaining other employment?

A. No, I didn't go up there, because they took me off the job, so if they took me off the job, I couldn't get more work. [195]

* * *

Q. (By Mr. Garoni): You made a statement a little while ago, that when Mr. Murphy handed you the second citation, you didn't know what it was for. Yet, did Mr. Murphy tell you out at the job out at Stonestown tract, that you failed to get a clearance, and didn't you know that?

A. He didn't tell me that.

Q. You tell me that you didn't know, and still don't know, the second time what the citation was for?

A. I was never told what the citation was for.

Q. No one informed you as to what the citation was for? A. No, nobody. [196]

* * *

Mr. Stanton: The Respondent employer is making no contention that his operations could not by some theory be tied into interstate commerce. Unquestionably, they could. [207]

* * *

The dispute that was involved didn't relate to any great issue of policy either between the employer and the union, or the employer association and the union. It related to the alleged violation of the charging party, by the charging party, of a rule of the union that a man had to report to the union before he moved from one job to another. The man had an opportunity, had he so desired, to straighten out his difficulty with the union, and from the employer's standpoint, he [216] was simply protecting a job that was in progress against an interruption, a minor interruption, resulting from the activities of a temporary employee who was a long-time member of the union and where the dispute did not represent any attempt or any charge that he was not a member of the union. [217]

* * *

This particular incident involved a temporary employee, one out of five hodcarriers, one out of eleven employees of the employer on this particular project. It was a matter of question as to whether he had complied with a rule of the union, which, from the employer's standpoint, presumably could be straightened out, and the employer was not put on notice that it could not be by reasonable action by the charging party. The employer was faced with an overt action by the union, which pulled or threatened to pull the hod carriers other than Mr. Charlton from the job, which would [221] have shut down the hod carrying operation and very quickly shut down the plasterers' operation, the masonry

operation, so that from a practical standpoint, and we submit also from the standpoint of the purpose of the Act, Respondent Reed was justified in taking the action which was taken by his foreman, because the interruption that would have resulted from failure to take the action that he did take would have been much more serious than the act which was taken, and that was to lay off the man until such time as the dispute that he was involved in with his union was settled. [222]

* * *

Mr. Garoni: * * * This is a sad travesty on human relations, that a minor incident of this nature, a failure to get a clearance card, has to result in a trial of this sort. Here is a gentleman, a union member for 42 years, who suddenly finds that after all he doesn't like a disciplinary rule, one perhaps which he himself promulgated and assisted in supporting, or the fact that he doesn't like his business agent, and here we are today on a case of this sort.

* * *

Received July 18, 1950. [223]

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GEORGE W. REED,

and

INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL No. 36, AFL,

Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, "In the Matter of George W. Reed and Ernest Sydney Charlton, Case No. 20-CA-268"; and "In the Matter of International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, and Ernest Sydney Charlton, Case No. 20-CB-80," such transcript including the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was

entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Peter F. Ward Trial Examiner for the National Labor Relations Board dated July 5, 1950.

(2) Stenographic transcript of testimony taken before Trial Examiner Ward on July 5, 6, and 7, 1950, together with all exhibits introduced in evidence.

(3) Respondent Reed's letter, dated July 18, 1950, requesting extension of time to file brief.

(4) Copy of Chief Trial Examiner's telegram, dated July 21, 1950, granting all parties extension of time to file briefs.

(5) Copy of Trial Examiner Ward's Intermediate Report, dated January 29, 1951 (annexed to item 18 hereof); order transferring case to the Board, dated January 29, 1951, together with affidavit of service and United States Post Office return receipts thereof.

(6) Copy of Erratum to Trial Examiner's Intermediate Report, dated February 6, 1951 (annexed to item 18 hereof), together with affidavit of service and United States Post Office return receipts thereof.

(7) Respondent Reed's letter, dated February 12, 1951, requesting extension of time for filing exceptions and brief.

(8) Respondent Union's letter, dated February 13, 1951, requesting extension of time to file brief.

(9) Copy of Board's telegram, dated February 14, 1951, granting all parties extension of time for filing exceptions and briefs.

(10) Respondent Reed's telegram, dated March 1, 1951, requesting further extension of time to file exceptions and brief.

(11) Copy of Board's telegram, dated March 2, 1951, granting all parties further extension of time to file exceptions and briefs.

(12) Respondent Union's exceptions to the Intermediate Report, received March 5, 1951.

(13) Respondent Reed's letter, dated March 7, 1951, requesting still further extension of time to file brief.

(14) Copy of Board's telegram, dated March 9, 1951, granting all parties still further extension of time to file exceptions and briefs.

(15) Respondent Reed's letter, dated March 15, 1951, requesting still further extension of time to file brief.

(16) Copy of Board's telegram, dated March 16, 1951, granting all parties still further extension of time to file briefs.

(17) Respondent Reed's exceptions to the Intermediate Report, received March 16, 1951. (Argumentative material deleted therefrom.)

(18) Copy of Decision and Order issued by the National Labor Relations Board on May 18, 1951, with Erratum to Intermediate Report and Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 19th day of March, 1952.

[Seal] /s/ LOUIS R. BECKER,
Executive Secretary,
NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 13310. United States Court of Appeals for the Ninth Circuit, National Labor Relations Board, Petitioner, vs. George W. Reed and International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL, Respondents. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed March 26, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13310

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GEORGE W. REED,

and

INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL No. 36, AFL,

Respondents.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent George W. Reed, (hereinafter called Respondent Reed), his agents, successors and assigns and Respondent International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL, (hereinafter called Respondent Union), its officers, representatives, agents, succes-

sors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "In the Matter of George W. Reed and Ernest Sydney Charlton, Case No. 20-CA-268"; and "In the Matter of International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, and Ernest Sydney Charlton, Case No. 20-CB-80."

In support of this petition the Board respectfully shows:

(1) Respondent Reed is engaged in business in the State of California and Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on May 18, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent George Reed, his agents, successors and assigns and Respondent Union, its officers, representatives, agents, successors, and assigns. The aforesaid order provides as follows:

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

1. The Respondent George W. Reed,[6] his agents, successors and assigns, shall:

a. Cease and desist from:

(1) Encouraging membership in International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL,[7] or in any other labor organization of his employees, by discharging and refusing to reinstate any of his employees for failing to obtain clearance from the Union or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

(2) In any other manner interfering with, restraining, or coercing his employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement executed in accordance with Section 8 (a) (3) of the Act.

b. Take the following affirmative action,

---

[6]Hereinafter referred to as the Employer.

---

[7]Hereinafter referred to as the Union.

which the Board finds will effectuate the policies of the Act:

(1) Offer to Ernest Sydney Charlton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges, and jointly and severally with the Union make him whole in the manner set forth in the section entitled The Remedy, for any loss of pay suffered by reason of the discrimination against him.

(2) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all pay roll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amount of back pay due and the right of reinstatement under the terms of this Order.

(3) Post in conspicuous places at his main office in San Francisco, California, and at the Stonestown project, and at all other places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Employer or his representative, be posted by him immediately upon receipt thereof and be maintained by him for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Employer to insure

that such notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps he has taken to comply herewith.

2. The Respondent International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL, its officers, representatives, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Causing or attempting to cause the Employer, his agents, successors, and assigns, to discharge or otherwise discriminate against any of its employees because they failed to obtain clearance from the Union, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

(2) In any other manner causing or attempting to cause the Employer, his agents, successors, and assigns, to discriminate against his employees in violation of Section 8 (a) (3) of the Act.

(3) Restraining or coercing employees of the Employer, his successors or assigns, in the exercise of the rights guaranteed in Section 7 of the Act.

(4) Causing or attempting to cause any other employer engaged in commerce within the meaning of the Act to discriminate against Ernest Sydney Charlton for failing to obtain

clearance from the Union, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

(5) In any other manner restraining or coercing Ernest Sydney Charlton, as an employee or prospective employee of any other employer engaged in commerce within the meaning of the Act, in the exercise of his right to refrain from any or all concerted activities within the meaning of Section 7 of the Act, except to the extent that such right may be affected by an agreement executed in accordance with Section 8 (a) (3) of the Act.

b. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Jointly and severally with the Employer make Ernest Sydney Charlton whole, in the manner set forth in the section entitled The Remedy, for any loss of pay he may have suffered by reason of the discrimination against him.

(2) Post immediately in conspicuous places at its business office, and at all other places where notices to its members are customarily posted, copies of the notice attached hereto and marked Appendix B. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by an official representative of the Union, be posted by it immediately upon receipt thereof and be maintained for a period of at least sixty

(60) consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that such notices are not altered, defaced, or covered by any other material.

(3) Notify the Employer, in writing, and furnish a copy to Ernest Sydney Charlton, that the Union has no objection to Charlton's employment by the Employer.

(4) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

(3) In the event that the Board's Order, heretofore set forth, is enforced by a decree of this Court, it is hereby further respectfully requested that the notices attached hereto and made a part hereof shall be amended by deleting therefrom the words "A Decision and Order," and there shall be inserted in their stead the words, "A Decree of the United States Court of Appeals Enforcing an Order."

(4) On May 18, 1951, the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to counsel for both Respondents.

(5) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evi-

dence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent Reed, his agents, successors and assigns and Respondent Union, its officers, representatives, agents, successors, and assigns to comply therewith.

NATIONAL LABOR
RELATIONS BOARD

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 19th day of March, 1952.

Appendix A

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not encourage membership in International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, or in any other labor organization of our employees, by discharging and refusing to reinstate any of our employees for failing to obtain clearance from Local No. 36, or by discriminating against our employees in any other manner in regard to their hire or tenure of employment, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement executed in accordance with Section 8 (a) (3) of the Act.

We Will offer to Ernest Sydney Charlton immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority, or other rights and

privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him.

All of our employees are free to become, remain, or to refrain from becoming or remaining, members of Local No. 36 or any other labor organization, except to the extent that this right may be affected by an agreement executed in accordance with Section 8 (a) (3) of the Act.

GEORGE W. REED
(Employer)

Dated.....

By .....,
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B

Notice

To All Members of International Hod Carriers, Building and Common Laborers Union of America, Local No. 36, AFL, and to All Employees of George W. Reed:

Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause or attempt to cause George W. Reed, his agents, successors, and assigns, to discharge or otherwise discriminate against any of his employees, because they failed to obtain clearance from this union, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act.

We Will Not in any other manner cause or attempt to cause George W. Reed, his agents, successors, and assigns, to discriminate against his employees in violation of Section 8 (a) (3) of the Act.

We Will Not restrain or coerce employees of George W. Reed, his agents, successors, and assigns, in the exercise of the rights guaranteed them in Section 7 of the Act.

We Will make Ernest Sydney Charlton whole for any loss of pay he may have suffered because of the discrimination against him.

INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION OF AMERICA, LOCAL No. 36, AFL

(Union)

Dated.....

By .....,

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed March 21, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding, petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board properly asserted jurisdiction over respondents' activities since they affect commerce within the meaning of the Act.

2. The Board properly concluded that the discharge of employee Charlton by Respondent Reed, upon the demand of Respondent Union, constituted violations of Sections 8 (a) (1) and (3) of the Act by Reed and of Sections 8 (b) (1) (A) and 8 (b) (2) by the Union.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 19th day of March, 1952.

[Endorsed]: Filed March 21, 1952.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To George W. Reed, 1390 S. Van Ness Ave., San Francisco, California, and International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, 200 Guerrero, San Francisco, California

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10 (e)), you and each of you are hereby notified that on the 21st day of March, 1952, a petition of the National Labor Relations Board for enforcement of its order entered on May 18, 1951, in a proceeding known upon the records of the said Board as

> "In the Matter of George W. Reed and Ernest Sydney Charlton, Case No. 20-CA-268, and in the Matter of International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL, and Ernest Sydney Charlton, Case No. 20-CB-80."

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 26th day of March in the year of our Lord one thousand, nine hundred and fifty-two.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Returns on service of writ attached.

Received March 27, 1952.

[Endorsed]: Filed April 9, 1952.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT GEORGE W. REED

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Respondent George W. Reed and as his answer and response to the petition for enforcement filed herein, admits, denies and alleges as follows:

I.

Answering paragraph (1) of said petition, Respondent denies that he has committed any unfair labor practice within this judicial circuit, or elsewhere. He denies that this Court has jurisdiction of the petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended (hereinafter referred to as the "Act").

II.

Respondent admits the allegations contained in paragraphs (2), (4) and (5) of said petition.

III.

The order which Petitioner seeks to enforce should be set aside for the reason that the following findings of fact and conclusions of the National Labor Relations Board (hereinafter referred to as the "Board"), and each of them, are not supported by substantial evidence on the record considered as a whole:

(a) The finding and conclusion that Respond-

ent's operations were subject to the Board's jurisdiction.

(b) The finding and conclusion that Respondent was engaged in commerce within the meaning of the Act, and that his operations had and tended to have a direct and substantial effect upon interstate commerce as defined by the Act.

(c) The finding and conclusion that it would effectuate the policies of the Act for the Board to assert and exercise jurisdiction in the matter before the Board.

(d) The finding and conclusion that the charging party, Ernest Sydney Charlton, was discharged by Respondent.

(e) The finding and conclusion that Respondent, by discharging Charlton, engaged in unfair labor practices within the meaning of Sections 8(a) (1) and (3) of the Act.

(f) The finding and conclusion that the Respondent Union, by causing Respondent to discharge Charlton, engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and Section 8 (b) (2) of the Act.

(g) The finding and conclusion that the activities of Respondent had a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tended to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV.

The order which Petitioner seeks to enforce is arbitrary, capricious and contrary to law, and

should therefore be set aside, for the following additional reason:

Said order was issued at a time when the Board was continuing to refuse to entertain petitions for certification and union-shop elections in the building and construction industry. The enforcement of the unfair labor practice provisions of the National Labor Relations Act against Respondent, under the circumstances of this case, at a time when employers (such as Respondent) and unions in the building and construction industry, have been denied the benefit and protection of the election provisions of the Act, is contrary to the intent of Congress, and a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

V.

Such portion of said order as directs Respondent to offer Ernest Sydney Charlton immediate and full reinstatement to his former or a substantially equivalent position should be set aside and denied enforcement for the reason that the undisputed evidence before the Board establishes that Charlton was a temporary employee of Respondent, on leave or "loan" from his regular employer, and that under the terms of such leave or "loan" Charlton would have returned to his regular employer on or about June 24, 1949.

VI.

Such portion of said order as directs Respondent to offer Ernest Sydney Charlton immediate and full

reinstatement to his former or a substantially equivalent position should be denied enforcement for the following reason:

Promptly after receiving notice of the Intermediate Report of the Trial Examiner in this proceeding, Respondent offered employment to Charlton as a hodcarrier at the prevailing wage rate for such work. Charlton worked for Respondent from February 9, 1951, to March 23, 1951, at which time he was laid off due to the termination of the project on which he was working.

Wherefore, Respondent prays that the Court set aside the Board's order and dismiss its petition for enforcement.

Dated: May 28, 1952.

GARDINER JOHNSON,
THOMAS E. STANTON, JR.

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Respondent
George W. Reed.

Affidavit of service by mail attached.

[Endorsed]: Filed May 28, 1952.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR ENFORCEMENT OF ITS ORDER

Comes now the Respondent, International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL, and for answer to the petition of the National Labor Relations Board, for the enforcement of its order against the Respondent, admits, denies and alleges as follows:

I.

Answering the allegations in Paragraph (1) of said petition, Respondent admits that Respondent Reed is engaged in business in the State of California and that Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of California, and further answering said Paragraph, denies each and every allegation and statement therein contained not herein specifically admitted to be true.

II.

Admits all of the Petitioner's allegations contained in Paragraphs (2), (4) and (5) of the petition herein.

III.

Alleges that Ernest Sydney Charlton, was offered reinstatement to his former position, without prejudice to any of his rights or privileges by both oral and written communications.

IV.

Allege that there is no substantial evidence on the record considered as a whole to support the findings and conclusions of law of the National Labor Relations Board, that the interstate commerce activities of the Respondent Employer, George W. Reed, tend to directly and substantially burden, obstruct or affect interstate commerce.

V.

Allege that there is insufficient evidence on the record considered as a whole to support the findings and conclusions of law of the National Labor Relations Board that the Respondent Employer George W. Reed, engaged in unfair labor practices within the meaning of section 8 (a) (1) and (3) of the National Labor Relations Act as amended; that the activities of said Respondent Employer did not tend to encourage or discourage the charging party or any other employees membership in a labor organization, or to restrain or coerce said Respondent Employer's employees in the exercise of their rights under Section 7 of the Act.

VI.

Allege that there is insufficient evidence in the record considered as a whole to support the findings and conclusion of law of the National Labor Relations Board that the Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and Section 8 (b) (2) of the Act; that the activities of the Respondent Union as

shown by the evidence did not restrain or coerce the charging party or any other employee in the exercise of their rights guaranteed in Section 7 of the Act, nor did the Respondent union attempt to cause the Respondent Employer herein to encourage or discourage any employee's membership in a labor organization.

And for a Further and Separate Defense to the Petition Filed Herein, This Respondent Alleges:

VII.

That the order of the National Labor Relations Board is contrary to law, void and of no effect, and in excess of its jurisdiction for the reason that it is based in part upon the alleged failure of the Respondent Employer and Respondent Union to have in effect a valid union security agreement executed in accordance with Section 8 (a) (3) of the Act; that at the time of the filing of the charge and complant herein the National Labor Relations Board could not and would not entertain petitions for union shop elections in the Building and Construction industry; that it was therefore impossible for the Respondent Employer and the Respondent Union to comply with the Act in said respect; that such inability and refusal of the Board to permit such a union-shop election amounted to a denial of due process of law in violation of the Fifth Amendment to the United States Constitution.

Wherefore this Respondent prays:

1. That the Petitioner's petition for enforcement herein be dismissed.

2. That this Honorable Court grant to the Respondent such other and further relief in the premises as the rights and equities of the cause may require.

Dated: June 4, 1952.

/s/ WATSON A. GARONI,
Attorney for Respondent International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL.

[Endorsed]: Filed June 5, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY THE RESPONDENT UNION

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit.

Comes now the Respondent International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL, and pursuant to Rule 19 (6) of the rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding, and designation of the record necessary for the consideration thereof:

I.

Statement of Points

1. That there is no substantial evidence on the record considered as a whole to support the findings

and conclusions of law of the Board, that the business operations of the Respondent Employer herein, tend to directly and substantially burden, obstruct, or affect interstate commerce.

2. That there is no substantial evidence on the record considered as a whole to support the findings and conclusions of law of the Board, that the Respondent Employer, through discrimination or coercion of discrimination encouraged or discouraged membership in a labor organization of the charging party or any other Employee, in any manner whatsoever as to constitute an unfair labor practice under the act.

3. That there is no substantial evidence on the record as a whole to support the findings and conclusions of law of the Board, that the Respondent Union through union coercion of employer discrimination brought about discrimination which tended to encourage or discourage the union membership of the charging party or any other employee, so as to constitute an unfair labor practice under the Act.

4. That the order of the Board based in part upon the failure of the Respondent's Employer and Union to execute a union shop agreement in conformity with Section 8 (a) (3) of the Act is contrary to law, void and of no effect amounting to a denial of due process of law in violation of the Fifth Amendment to the United States Constitution in view of the National Labor Relations

Board's inability and refusal to entertain elections for a union shop in the Building Construction Industry at the time of the bringing of the charges and complaint herein.

* * *

Dated: June 4, 1952.

/s/ WATSON A. GARONI,

Attorney for Respondent, International Hod Carriers, Building & Common Laborers Union, Local No. 36, AFL.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 5, 1952.

No. 13310

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GEORGE W. REED AND INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals for the Ninth Circuit

No. 13310

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GEORGE W. REED AND INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order (R. 58–63)[1] issued against respondents on May 18, 1951, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151 *et seq.*).[2] The Board's decision and order are reported in 94 N. L. R. B. 698. This Court has jurisdiction under Section 10 (e) of the Act, as the unfair labor prac-

[1] References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; references following a semicolon are to the supporting evidence.

[2] The pertinent provisions of the Act are set out in the Appendix, *infra*, pp. 21–27.

tices in question occurred at San Francisco, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found, contrary to respondents' contentions, that the operations of respondent George W. Reed affect commerce within the meaning of the Act and that the Board should exercise its jurisdiction over Reed. The Board also found, and respondents concede (R. 33–34, 38, 56; 9–11, 76–79, 81–83, 127, 140, 159, 171, 182, 192–193) that Reed terminated the employment of hod carrier Charlton because the Union (International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL) demanded Charlton's discharge for failing to obtain Union clearance before taking a job with Reed. The Board concluded that Reed had violated Section 8 (a) (3) and (1) of the Act by terminating Charlton's employment under the circumstances and that the Union, by causing Reed to discriminate against Charlton, violated Section 8 (b) (2) and (1) (A) of the Act (R. 56–57).

The following subsidiary facts, as found by the Board, are substantially undisputed.

A. Respondent Reed's business

Respondent Reed is a masonry subcontractor in the San Francisco Bay area (R. 17; 87). He normally employs more than 25 bricklayers and hod carriers (R. 18; 88) in the performance of his contracts which, for the year 1949, were valued at $481,869 (R. 20; 106). At the time of Charlton's dismissal, Reed was

engaged in completing a $110,239 contract to build brick boiler room chimneys, garages, and trimmings for the Stonestown project, a multi-million-dollar apartment and commercial development in San Francisco (R. 18, 21–22, n. 15; 108–110, 115, 95–96).

Although most of Reed's masonry materials are produced and purchased in the State of California,[3] a substantial part of his work is done for firms which are engaged in interstate commerce (R. 19–26; 9–10, 89–91, 93–98, 118–121). The Board asserted jurisdiction in this case because of the effect on commerce of Reed's general operations as indicated by certain of his 1948–49 contracts which are shown in the following table (R. 56):

I Year	II Company[1] for which Reed performed services	III Nature of business[2]	IV Type of work done by Reed	V Value of Reed's subcontract
1948	Pacific Telephone & Telegraph Co.	Instrumentality of commerce; Public utility.	Masonry work on telephone exchange building.	$148,000 (R–19, 24; 89–90).
1948	Pacific Gas & Electric Co.	Public utility	Masonry work on substation.	$60,000 (R. 19, 24; 91).
1949	Pacific Telephone & Telegraph Co.	Instrumentality of commerce; Public utility.	Masonry and related work on new 9–10 story combination office and telephone exchange building.	$150,000 (R. 20, 25; 94–95).
1949	Standard Oil Co. of California.	Enterprise producing or handling goods destined for out-of-state shipment valued at more than $25,000 per annum.	Masonry and related work on new office building.	$200,000 (R. 20–21; 25–26; 98, 118–121).

[1] The Board's earlier findings (which respondents do not challenge) that these concerns (Column II) are engaged in commerce within the meaning of the Act, are reported at 74 N. L. R. B. 536 (Pacific Telephone & Telegraph Co., 7/17/47), 87 N. L. R. B. 257 (Pacific Gas & Electric Co., 11/29/49), and 79 N. L. R. B. 1466 (Standard Oil Company of California, 10/20/48). The parties stipulated (R. 20, n. 11; 93) that The Pacific Telephone & Telegraph Co. and The Pacific Gas & Electric Co. are public utilities with their main offices in San Francisco.

[2] The categories in Column III refer to the Board's classifications in *Hollow Tree Lumber Co.*, 91 N. L. R. B. 635, *infra*, pp. 27-29 (R. 56, n. 2).

[3] The testimony of Respondent Reed that his only out-of-state purchase during 1949 was $1,900 worth of Indiana limestone (R. 100) is not disputed.

B. Reed discharges Employee Charlton upon the demand of the Union

Respondent Reed has, for many years, been one of approximately 40 members of the Masons and Builders Association of California, Inc., a group which bargains collectively and enters into multiple-employer contracts with respondent Union covering hod carriers employed by Reed and other Association members (R. 17–18; 185–187). Previous contracts had expired, however, and no new contract had been executed at the time of the unfair labor practices in this case (R. 18, n. 6; R. 186–187, Tr. 197).

On June 14, 1949, the Union's business agent, Joe Murphy, visited the Stonestown site, talked to some of Reed's employees there, and informed Reed's foreman, Pat McDonaugh, that one of his hod carriers, Ernest Sidney Charlton, would have to be laid off. Murphy explained that Charlton had failed to get a clearance from the Union [4] before taking the job with Reed and threatened to take the rest of the hod carriers off the job unless Charlton were dismissed at once. Foreman McDonaugh thereupon bowed to the Union's demand and immediately terminated Charlton's employment (R. 28–31; 76–79, 81–83, 127, 134–135, 138–140, 159, 176–178, 190–191, 10).

[4] The Union had, for many years, had a rule requiring each member to report the name of his prospective employer and obtain clearance from the Union before taking a new job (R. 31, 33, 35; 79, 81–82, 134–135, 140, 182–184, 192–193). Charlton was at the time of his discharge, as he had been for many years, a member of respondent Union (R. 28; 173, 182).

II. The Board's conclusions

Upon the foregoing facts, the Board concluded that Reed's operations affect commerce within the meaning of the Act and that it would "effectuate the policies of the Act to assert jurisdiction here" (R. 56).

With respect to the termination of Charlton's employment, the Board found that, by acquiescing in the Union's demand for Charlton's dismissal, Reed had, in effect, granted closed-shop rights to the Union, thereby encouraging Union membership and enabling respondent Union to enforce obedience to its internal rules by job discrimination in violation of the Act. The Board therefore concluded that respondent Reed, by dismissing Charlton, had committed unfair labor practices in violation of Sections 8 (a) (1) and (3) of the Act and that respondent Union, by causing Charlton's dismissal, had committed unfair labor practices in violation of 8 (b) (1) (A) and (2) (R. 56–57).

III. The Board's order

The Board's order (R. 59–63) directs respondent Reed to cease and desist from encouraging membership in respondent Union or any other labor organization of his employees by discriminating in regard to their employment except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Act.

The Board's order requires the Union to cease and desist from causing or attempting to cause Reed to

discharge or otherwise discriminate against his employees, and from causing or attempting to cause any other employer engaged in commerce to discriminate against Charlton, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act, and from restraining or coercing Charlton or any of Reed's employees in the exercise of the rights guaranteed in Section 7 of the Act.

Affirmatively, the Board's order directs Reed to offer Charlton reinstatement and the Union to notify Reed in writing that it has no objection to his employing Charlton. The order further requires Reed and the Union, jointly and severally, to make Charlton whole for any loss of pay suffered because of the discrimination against him, and to post appropriate notices.

SUMMARY OF ARGUMENT

I. The coverage of the Act is as broad as the power of Congress over interstate commerce and extends to local businesses which, in their interlacings with firms engaged in interstate commerce, may adversely affect that commerce. The substantial services furnished by Reed to public utilities, instrumentalities of commerce, and other enterprises largely engaged in interstate commerce clearly bring his operations within the coverage of the Act. Since the amount of such contributions by Reed is well in excess of the Board's standards for discretionary assertion of jurisdiction, the Board properly asserted jurisdiction here.

II. Reed's admitted lay-off of employee Charlton at the Union's request for failure to comply with a Union rule requiring him to obtain a clearance was

violative of the Act since it constituted enforcement of closed shop conditions and was not protected by a valid union security contract. Since application of closed shop requirements is prohibited under any other circumstances, Reed violated Section 8 (a) (3) and (1) of the Act by terminating Charlton's employment, and the Union violated Sections 8 (b) (2) and (1) (A) by causing Reed's action against Charlton.

An employer encourages union membership within the meaning of the statute when, by job discrimination, he encourages employees to become or remain union members in good standing.

III. The fact that Charlton may have been temporarily employed by respondent Reed pending recall by his former employer does not make the Board's order requiring Reed to offer him reinstatement inappropriate since he was not in fact recalled and the record does not indicate that Reed did not continue to need his services. Nor does any alleged reinstatement of Charlton subsequent to the close of the record in this case constitute a defense to the Board's petition for enforcement.

ARGUMENT

POINT I

Respondent Reed's operations affect interstate commerce and the Board properly asserted jurisdiction over them

Respondents' contention (R. 50–52, 212–213, 217) that the operations of Reed do not affect commerce within the meaning of the Act must be viewed in the light of the well-established principles that the cover-

age of the Act is as broad as the power of Congress over interstate commerce, and that the Act extends to businesses whose activities in isolation may be deemed local but which in their interlacings with other businesses across state lines adversely affect commerce. See *N. L. R. B.* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 683–685; *Polish National Alliance* v. *N. L. R. B.,* 322 U. S. 643, 647–648; *N. L. R. B.* v *Fainblatt,* 306 U. S. 601, 604, 607–608; *N. L. R. B.* v. *Townsend,* 185 F. 2d 378, 382–383 (C. A. 9), certiorari denied, 341 U. S. 909; *N. L. R. B.* v. *Fry Roofing Co.,* 193 F. 2d 324, 327 (C. A. 9); *N. L. R. B.* v. *Holtville Ice and Cold Storage Co.,* 148 F. 2d 168, 169 (C. A. 9).

The record amply supports the Board's conclusion that Reed's operations have a substantial effect upon interstate commerce because of the interlacing of Reed's activities with those of other businesses, the interstate character of whose operations are not in dispute. Thus, as shown *supra,* p. 3, although Reed buys only a small amount of materials from out-of-state sources, it supplies materials and services in large quantities to public utilities, instrumentalities of commerce, and enterprises engaged in producing or handling goods destined for out-of-state shipment. During the years 1948 and 1949, Reed did over $550,000 worth of masonry work for such enterprises.[5]

Respondents' further assertion (R. 213) that the Board, in any event, abused its discretion in assert-

[5] In addition, as the Trial Examiner pointed out (R. 21–24, 27; 96, 115–6), Reed furnished services valued in excess of $110,000 in the construction of the multi-million dollar Stonestown De-

ing jurisdiction over Reed's operations is patently without merit. The Board for approximately a year prior to the discharge of employee Charlton had been asserting jurisdiction over the construction industry, and respondents, when they engaged in the unfair labor practices here involved, had no reason to believe that they would be immune from the Board's processes.[6]

Moreover, the amount of materials and services furnished by Reed to enterprises whose operations unquestionably affect interstate commerce was far in excess of the Board's minimum standards for discretionary assertion of jurisdiction. The Board in *Hollow Tree Lumber Co.,* 91 N. L. R. B. 635, 636, announced certain standards for the assertion of its jurisdiction which it set up to reflect "the results reached in the Board's past decisions disposing of similar jurisdictional issues." In that decision and in its press release issued a few days later on October

velopment project where employee Charlton was working at the time of his discharge. This project had received over $350,000 worth of materials from out-of-state sources prior to the hearing (R. 27; 141–3, 149–50, 152–5). In view of the clear impact of Reed's other operations upon interstate commerce, however, the Board found it unnecessary to rely upon Reed's part in the Stonestown project for its assertion of jurisdiction (R. 56).

[6] Cf. *N. L. R. B.* v. *Atkinson Co.*, 195 F. 2d 141 (C. A. 9) in which this Court denied enforcement of a Board order against two employers in the construction industry pointing out that prior to the Board's decision in *Ozark Dam Constructors*, 77 N. L. R. B. 1136, on June 16, 1948, the Board had declined to assert jurisdiction in the construction industry and holding that the Board's retroactive application of its policy to exercise jurisdiction in that industry resulted in an inequitable treatment of the employers under the circumstances of that case.

6, 1950 (Appendix, *infra,* pp. 27–29), the Board announced that it would assert jurisdiction over enterprises which furnish services or materials necessary to the operation of enterprises such as those of which the Board took cognizance in this case, provided that such goods or services are valued at $50,000 a year. The $550,000 worth of services and materials furnished by Reed to these types of businesses in 1948 and 1949 is accordingly well above the minimum standard. It is within the province of the Board, of course, to establish its standards for exercising jurisdiction. And as this Court stated in *N. L. R. B.* v. *Townsend,* 185 F. 2d 378, 383, certiorari denied, 341 U. S. 909, "Providing the Board acts within its statutory and constitutional power, it is not for the courts to say when that power should be exercised." See also: *Haleston Drug Stores, Inc.* v. *N. L. R. B.,* 187 F. 2d 418, 421, certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Atkinson Co.,* 195 F. 2d 141 (C. A. 9).

Point II

The Board properly found that respondent Reed violated Sections 8 (a) (1) and 8 (a) (3) of the Act by discharging Charlton at the insistence of respondent Union and that respondent Union violated Sections 8 (b) (1) (A) and 8 (b) (2) of the Act by causing Charlton's discharge

A. In depriving employee Charlton of work because of his lack of union clearance, respondents were not protected by any valid union security agreement

Respondents do not challenge the Board's finding (R. 38, 56) that the Union, in demanding the termination, and Reed, in terminating,[7] the employment of

[7] Respondent Reed contended that Charlton was not discharged as alleged in the complaint but was only laid off "until he

Charlton because he did not have clearance from the Union were attempting to operate under closed shop conditions—that is, arrangements requiring union membership as a condition precedent to being hired (R. 50–51, 214). Closed shop agreements made subsequent to the amendment of the Act are, of course, outlawed under Section 8 (a) (3) of the Act.[8] Only those closed shop contracts executed prior to the amendments are valid under Section 102 of the Act. Respondents were not operating under any closed shop contract executed prior to the amendments and were therefore not protected by Section 102. As this and other courts have held, an employer not protected by a valid union security agreement violates Section 8 (a) (3) and (1) of the Act when he discharges or refuses to hire an employee because of the employee's lack of union membership or of approved union status and the union violates Section 8 (b) (2) and (1) (A) when it causes such job discrimination. *N. L. R. B.* v.

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straightened out his difficulty with the Union Business Agent" (R. 33, 35; 10, 213, 81–83, 159, 192–193). Since a lay-off and a discharge are equally violative of the Act if done for illegal reasons, the choice of words here is of no consequence. *N. L. R. B.* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 349–50.

[8] Section 8 (a) (3) permits the making only of union security contracts requiring as a condition of employment membership on or after the thirtieth day following the beginning of employment or the effective date of the agreement, whichever is the later, and legalizes job discrimination under such contracts only for failure to tender periodic dues or initiation fees. Until October 22, 1951, when Congress further amended the Act (Ch. 534, Public Law 189, par. (b), 82nd Cong., 1st Sess.), these union-shop contracts could be made only following certain prescribed election procedures. Section 102 of the Act, however, protects closed shop and other forms of union security agreements already in existence when the 1947 amendments were enacted.

Guerin, No. 12994, decided May 14, 1952 (C. A. 9), enforcing without opinion 92 N. L. R. B. 1698; *N. L. R. B.* v. *Fry Roofing Co.,* 193 F. 2d 324, 326 (C. A. 9); *Katz* v. *N. L. R. B.,* 196 F. 2d 411, 414–16 (C. A. 9); *N. L. R. B.* v. *International Union, etc.,* 194 F. 2d 698, 702 (C. A. 7); *Red Star Express Lines* v. *N. L. R. B.,* 196 F. 2d 78, 79, 81 (C. A. 2), enforcing 93 N. L. R. B. 127, 153, 157–158; *N. L. R. B.* v. *McKee & Co.,* 196 F. 2d 636 (C. A. 5); *N. L. R. B.* v. *Radio Officers Union,* 196 F. 2d 960, 965 (C. A. 2), union petition for certiorari pending; *N. L. R. B.* v. *Acme Mattress Co.,* 192 F. 2d 524, 525–27 (C. A. 7); *N. L. R. B.* v. *Jarka Corp.* (C. A. 3), August 15, 1952, 30 L. R. R. M. 2537; *N. L. R. B.* v. *Peerless Quarries, Inc.,* 193 F. 2d 419, 421 (C. A. 10). Cf. *N. L. R. B.* v. *Clara-Val Packing Co.,* 191 F. 2d 556 (C. A. 9).

Respondents contend, however, that they should be excused for violating the statute because of their inability to enter into a valid union shop contract due to the General Counsel's failure to process representation and union shop authorization elections in the construction industry (R. 50–51, 214, 218).[9] But this argument is entirely misplaced. Respondents were attempting to operate under *closed* shop, not *union* shop conditions. Besides, respondents' conduct would not have been lawful even if they had been operating under a valid union shop contract. The Union here

[9] Respondent Reed's further contention (R. 10, 36–37) that it should not be held responsible for laying Charlton off because it did so only on account of the Union's threat to cause other employees to cease work is plainly without merit. *N. L. R. B.* v. *Fry Roofing Co.,* 193 F. 2d 324, 327 (C. A. 9); *N. L. R. B.* v. *Star Publishing Co.,* 97 F. 2d 465, 470 (C. A. 9).

demanded Charlton's discharge because he did not have union clearance prior to being hired. Under a union shop contract the Union could lawfully have demanded Charlton's discharge for lack of acceptable status with the Union solely due to failure to tender his periodic dues.[10] It is undisputed that Charlton was not in arrears in his dues at the time of his discharge and that he thereafter tendered his dues but the Union refused to accept them (R. 34; 173, 181–182).

B. Respondents' contention that the discrimination against Charlton did not encourage union membership is without merit

Respondents contend, nevertheless, that they did not violate the statute because the discrimination against Charlton did not encourage union membership within the meaning of the Act. They apparently base this assertion on the fact that Charlton had for almost 40 years been a union member and continued to tender his dues to the Union subsequent to his discharge (R. 33–34, 57, n. 4; 217, 220). This argument ignores the effect that Charlton's discharge may have had upon the union adherence of other employees. It also ignores the fact that closed shop conditions for hod carriers have generally prevailed in the San Francisco area and, as the Board pointed out, Charlton may well have felt impelled to join and retain his membership in order not to "run the chance of being deprived of a

[10] See: Sec. 8 (a) (3) of the Act; *Union Starch & Refining Co.* v. *N. L. R. B.*, 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Electric Auto-Lite Co.*, 196 F. 2d 500 (C. A. 6) enforcing, *per curiam*, 92 N. L. R. B. 1073, 1077–78, union and employer petitioners for certiorari pending.

continuing opportunity to earn his livelihood at his trade" in that area (R. 35–36 and n. 31; 84–85, 160, 171, 191, 127, 140). Moreover, as the Board further noted in *American Pipe and Steel Corp.*, 93 N. L. R. B. 54, 56, which it cited with approval in this case, "By the act of yielding to the [Union's] demand that [the employee] be removed, the Employer perforce strengthened the position of the [Union] and forcibly demonstrated to the employees that membership in, as well as adherence to the rules of, that organization was extremely desirable. Such encouragement of union membership was particularly effective when, as in the present case, the Employer deferred to the demand of the [Union] that employees be cleared through its hall, and membership appears to have been a condition precedent to obtaining the necessary clearance."

It is well settled, as this Court stated in *N. L. R. B.* v. *Walt Disney Products,* 146 F. 2d 44, 49, certiorari denied, 324 U. S. 877, that "the purpose and effect of a discriminatory discharge need not be shown by positive evidence but * * * if discouragement (or encouragement) as to union membership may reasonably be inferred from the circumstances of the discharge, the finding of the Board is binding upon the reviewing court."[11] And as this and other courts have recognized, union membership in the context in which it occurs in Section 8 (a) (3) of the Act

[11] See also *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 595–596 (C. A. 9) and cases cited therein; *N. L. R. B.* v. *Cities Service Oil Co.*, 129 F. 2d 933, 937 (C. A. 2); *N. L. R. B.* v. *Gaynor News Co., Inc.*, 197 F. 2d 719, 722 (C. A. 2).

embraces more than being listed on a union's membership roster; it is synonymous also with membership in good standing, which embraces union fealty and acceptance of the obligations of union membership. Thus, in the *Walt Disney* case, *supra,* this Court held that even though all employees were compelled under a closed-shop contract to be union members, the discharge of the union leader discouraged union membership within the meaning of the Act because it might encourage the employees to forego all active part in union affairs, thereby in effect relinquishing their union membership. See also *Paul Cusano* v. *N. L. R. B.,* 190 F. 2d 898, 901–903 (C. A. 3) (discharge for making allegedly false statement in course of a report to fellow union members). Similarly an employer encourages union membership where, as here, he discriminates against a union member because of that member's failure to observe all the obligations of his union membership or because of his lack of union fealty. See *N. L. R. B.* v. *Guerin,* No. 12994, decided May 14, 1952 (C. A. 9) enforcing without opinion 92 N. L. R. B. 1698 (discharge of union member for failure to get union clearance); *N. L. R. B.* v. *The Radio Officers' Union, etc.,* 196 F. 2d 960 (C. A. 2), now pending before Supreme Court on union's petition for certiorari (denial of employment to union member for his failure to accept union principles and rules); *Colonie Fibre Co.* v. *N. L. R. B.,* 163 F. 2d 65 (C. A. 2) (discharge for nonpayment of dues retroactively imposed); *N. L. R. B.* v. *Jarka Corp.* (C. A. 3), decided August 15, 1952, 30 L. R. R. M. 2537 (refusal to hire union man not in "good standing"); *N. L. R. B.* v. *Electric*

Auto-Lite Co. 196 F. 2d 500 (C. A. 6), enforcing *per curiam,* 92 N. L. R. B. 1073, employer and union petitions for certiorari pending (discharge of union member for failure to attend union meetings); *Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008, 1011 (C. A. 7), certiorari denied, 324 U. S. 815 (discharge of conscientious objector who tendered dues but refused to take union oath).

Only one of the courts of appeals which have had occasion to pass on the question appears to have taken a more restricted view of the meaning of union membership. That court, the Eighth Circuit, in *N. L. R. B.* v. *International Brotherhood of Teamsters, etc.,* 196 F. 2d 1, 4 (C. A. 8), now pending before the Supreme Court on the Board's petition for a writ of certiorari, treated the term union membership as being no broader than "adhesion to membership" or remaining on the union's membership roster. In that case the employer, in the absence of a valid union security contract, delegated to the union control over the seniority list and denied job assignments to a union member who had been dropped by his union to the bottom of the seniority list for becoming delinquent in the payment of his dues. The Court held that such action, did not encourage union membership within the meaning of the Act where the employee testified that his union membership was not encouraged and no evidence was introduced to show that any other employee's union membership was encouraged. That court thus appears to be in disagreement with the other courts of appeals on two counts: (1) it does not consider that job discrimination which necessarily

encourages a union member to observe his union's policies or obligations—that is, to be in good standing—encourages his union membership since it does not necessarily encourage him to remain on the union's membership roster; and (2) it will not assume, but requires proof, that job discrimination for failure of an employee to pay his union dues encourages membership of other employees in the union. Because of the importance of these questions in the administration of the Act and of the conflict between the Eighth Circuit's decision and the decisions of the other courts of appeals, the Board has petitioned the Supreme Court to review the *Teamsters* decision.[12]

[12] In their motions for an extension of time in which to answer the Board's petition for enforcement, respondents have indicated that they are relying upon two other recent Eighth Circuit decisions to support their view that the discrimination against Charlton did not encourage union membership within the meaning of the Act. These cases, *Del E. Webb Construction Co.* v. *N. L. R. B.*, 196 F. 2d 841, and *N. L. R. B.* v. *Del E. Webb Construction Co.*, 196 F. 2d 702, do not, we believe, support respondents' contention. In the first case, the Court set aside the Board's fact finding that the employer, acting pursuant to an illegal union security contract, denied employment to union members who had failed to receive clearance from their union. It held that there was no substantial evidence to support the Board's finding that an illegal union security contract existed or that the employees involved had made application for jobs to any authorized employer representative. It expressly reserved decision on whether "a practice of making all union laborers seek employment through their union halls is or is not an unfair labor practice" (196 F. 2d at 848).

In the second case the Court rejected the Board's finding of fact that the employer had discharged an employee because he was a member of a subcharter apprentice local rather than the parent journeyman local, thereby encouraging membership in the parent local and discouraging membership in the subcharter local. The Court held that the two locals should be treated as one union, but

We think, however, that regardless of the correctness of the Eighth Circuit's views in the *Teamsters* and *Webb* cases (see footnote 12), those decisions are not controlling in this case for respondents here were operating under unlawful closed-shop conditions and Charlton and other employees, as we have shown, could not relinquish their union membership without jeopardizing their job opportunities.

Point III

The Board's order is proper

In its answer to the petition for enforcement, respondent Reed contests that part of the Board's order which requires Reed to offer Charlton reinstatement (1) on the ground that Charlton was employed by Reed on a temporary basis until Charlton might be recalled by his regular employer and that the regular employer would normally have recalled Charlton on or about June 24, 1949, and (2) on the ground that subsequent to the issuance of the Trial Examiner's intermediate report, respondent Reed in fact reinstated Charlton (R. 214–215). Neither contention constitutes any defense to the Board's petition for enforcement.

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that in any event, since the employee was not eligible for membership in the parent journeyman local, the discrimination against him because he was not a member of it could not encourage or discourage his union membership. (But *cf: N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719, 722–723 (C. A. 2).)

Insofar as the *Webb* cases or either of them might possibly be subject to the interpretation respondents apparently place upon them, they are, of course, contrary to the great weight of authority, as above shown.

As to the first contention, the record shows that Charlton and two other employees were hired by Reed for an indefinite period, with Reed agreeing to release them to their former employer, Drake, upon the latter's request; that on or about June 24, 1949, Drake recalled the other two employees but did not recall Charlton because he had already heard from Charlton and another source about Charlton's trouble with the Union as a result of which Charlton could not go to work (R. 28; 157, 160, 168–171, 175). Since Reed hired Charlton for an indefinite period and the record does not show that Reed ever ceased to need his services, it cannot be assumed that absent Reed's discriminatory termination of his employment, Charlton would not have continued working for Reed after Drake failed to recall him. Under the circumstances, the Board's order requiring Reed to offer Charlton reinstatement is "adapted to the situation which calls for redress." *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348.

As to Reed's second contention, it is immaterial whether Reed, subsequent to the Trial Examiner's findings and recommended order, may have offered Charlton reinstatement. The Board's order which is before this Court for enforcement is based upon the record made at the hearing before the Trial Examiner. It is well settled that partial or even full compliance by the respondent is no defense to enforcement of the order. *N. L. R. B.* v. *Mexia Textile Mills,* 339 U. S. 563, 567; *N. L. R. B.* v. *Pool Mfg. Co.,* 339 U. S. 577, 581, 582. Reed is, of course, relieved, under the Board's order, of back-pay

liability for any time he may have employed Charlton at his former or an equivalent job subsequent to the unfair labor practice found. Evidence of such reinstatement will become appropriate only in a post-decree compliance proceeding for determination of the exact amount of back-pay due. *N. L. R. B.* v. *Bird Machine Co.,* 174 F. 2d 404, 405–406 (C. A. 1) and cases there cited. See also, *N. L. R. B.* v. *Carlisle Lumber Co.,* 99 F. 2d 533, 539 (C. A. 9), certiorari denied, 306 U. S. 646. In such a proceeding Reed, of course, will also have an opportunity to establish that Charlton's employment would have been discontinued for a non-discriminatory reason subsequent to the closing of the record in this case.

CONCLUSION

For the reasons stated, petitioner respectfully submits that a decree should issue enforcing the Board's order in full.

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SEPTEMBER 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, Secs. 151, *et seq.*), are as follows:

Definitions

SEC. 2. When used in this Act—

* * * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * *

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collective through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be af-

fected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; [and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:][1] *Provided further,*

[1] On October 22, 1951, Section 8 (a) (3) of the Act was amended by striking out the bracketed portion of the first sentence and inserting in lieu thereof the following:

"and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with section 9 (f), (g), and (h) and (ii) unless following an

That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from

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election held as provided in section 9 (e) within 1 year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:" (Public Law 189, par. (b), 82d Cong., 1st sess; 65 Stat. 601.)

engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, adopted by the Supreme Court

of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the

Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining

agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

* * * * *

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D. C.

Release for morning papers (R–342)
Friday, October 6, 1950

N. L. R. B. CLARIFIES AND DEFINES AREAS IN WHICH IT WILL AND WILL NOT EXERCISE JURISDICTION

The National Labor Relations Board today announces the establishment of standards which will govern its exercise of jurisdiction under the Taft-Hartley Act.

The various "yardsticks" which will be used by the Board in future cases involving all enterprises were set forth in eight unanimous decisions issued simultaneously. Pointing out that these standards "reflect, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues," the Board said:

> The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.
>
> The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the

> fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should, in our opinion, be maintained.

The Board thereby reiterated its policy of not exercising jurisdiction, despite its power to do so, over business operations so local in character that a labor dispute would be unlikely to "have a sufficient impact upon interstate commerce to justify an already burdened Federal Board in expending time, energy and public funds."

The plan that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution, the Board will exercise jurisdiction over:

1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems).
2. Public utility and transit systems.
3. Establishments which operate as integral parts of a multistate enterprise (for example, chain stores, and branch divisions of national or interstate organizations).
4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year.
5. *Enterprises which furnish services or materials necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year.* [Italics added.]

6. Any other enterprise which has:

(a) a direct inflow of material valued at $500,000 a year; or

(b) an indirect inflow of material valued at $1,000,000 a year; or

(c) a combination inflow or outflow of goods which add up to at least a total of "100%" of the amounts required in items 4, 5, 6 (a) and (b) above.

7. Establishments substantially affecting national defense.

U. S. GOVERNMENT PRINTING OFFICE: 1952

No. 13,310

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GEORGE W. REED, and INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, A.F.L.,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT GEORGE W. REED.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 13,310

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GEORGE W. REED, and INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, A.F.L.,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT GEORGE W. REED.

I. SUPPLEMENTAL STATEMENT OF THE CASE.

This case involves the action of a local Business Agent of the Hod Carriers Union who threatened to order all of the members of his Union to cease working with another member of the Union until the latter complied with a Union rule requiring that he have a "clearance" from the Union for the particular job on which he was employed (R. 125-128, 135-136, 183-184). The president of the Union testified that the rule requiring a clearance was for the protection of

Union members against irresponsible contractors (R. 135-136), and that the charging party in this case could have had a clearance for the asking (R. 138), since there was no question as to respondent George W. Reed's financial responsibility (R. 139).

Faced with the loss of his entire crew of five hod carriers because of the Business Agent's threats, respondent Reed laid the charging party off until such time as he straightened out his difficulty with his Union (R. 78, 159). The charging party never sought a clearance from his Union, although a week after his layoff he sought and obtained the Business Agent's signature to a form needed in connection with his claim for unemployment compensation insurance (R. 124, 190). At that time he was offered a clearance to work on respondent Reed's job, but rejected the offer (R. 125, 138).

The charging party has been a member of the Hod Carriers Union continuously since 1906, with but one brief interruption (R. 173). Following his difficulty with the Union on respondent's job, he tendered his Union dues (R. 173) and his membership in the Union has continued uninterrupted (R. 182), without resignation (R. 174) or expulsion (R. 173, 182).

The charging party was a temporary employee of respondent Reed, having been hired during a lull in the operations of his regular employer, Harry E. Drake, and upon the understanding that he would return to Mr. Drake's employment when the latter's operations picked up (R. 157, 160, 168). Mr. Drake's operations did pick up on June 24, 1949, ten days after

the charging party was laid off by respondent Reed, and Mr. Drake recalled two other men whom he had sent to respondent Reed along with the charging party (R. 169). Mr. Drake had work for hod carriers at that time, and he would have employed the charging party if the latter had applied for work (R. 169-170).

At the time the charging party was laid off the crew with which he was working was engaged in the building of flower boxes in front of apartment houses at Stonestown in San Francisco (R. 84). All of the material used by respondent Reed on this project came from sources within the State of California (R. 99-100). Respondent Reed had no labor disputes or difficulties on any of his other projects during 1949 (R. 105).

II. SUMMARY OF ARGUMENT.

Respondent Reed contends that this Court should set aside the Board's order as to him for the following reasons:

A. Even if it were to be assumed that respondent Reed's conduct constituted an unfair labor practice within the meaning of Section 8 (a) of the National Labor Relations Act, such conduct was not an "unfair labor practice affecting commerce" within the meaning of Section 10 (a) of the Act. At the time the Business Agent of the Hod Carriers Union threatened to order the members of his Union not to work with the charging party, respondent's crew of hod carriers

and bricklayers was engaged in the construction of flower boxes for apartment houses. An interruption of this work could not possibly have had a direct effect upon the movement of materials in interstate commerce, since respondent Reed used no materials from out-of-state sources on the project. There was no evidence whatever that a delay in the installation of flower boxes, or of the chimneys and garages which were also a part of respondent's subcontract, would have interrupted any other construction work on the project or the inflow of any of the out-of-state material which went into such other work. The labor difficulty in question, namely, the refusal of members of the Hod Carriers Union to work with another member who had not complied with a Union rule, did not in any way involve or affect respondent's operations on other projects, and hence a consideration of the impact of such other operations upon interstate commerce is not material to a determination as to whether this particular alleged unfair labor practice "affected [interstate] commerce".

B. Respondent Reed's conduct was not an unfair labor practice within the meaning of Sections 8 (a) (1) and 8 (a) (3) of the Act, since such conduct did not have the proximate and predictable effect of encouraging or discouraging membership in the Hod Carriers Union. The charging party was a member of the Hod Carriers Union, and had been a member of that Union for many years. After his layoff by respondent, he took active steps to maintain his Union membership by the tender of dues, and such member-

ship did in fact continue. No other hod carrier who had knowledge of respondent's conduct was either encouraged in or discouraged from Union membership, since uncontradicted evidence established that all of them were members of the Union.

C. The order is arbitrary, capricious and contrary to law for the reason that it was issued at a time when employers (such as respondent Reed) and unions in the building and construction industry were being effectively denied the benefit of the election provisions of the National Labor Relations Act. The enforcement of the unfair labor practice provisions of the Act in such circumstances is contrary to the intent of Congress, and a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

Respondent Reed contends, further, that in the event enforcement of the Board's order is directed, his liability for back pay should be limited to the loss of pay attributable to his conduct; namely, such loss of pay as the charging party may have suffered during the period from June 14, 1949, the date of the layoff, to June 24, 1949, the date on which the charging party, in the normal course of events, would have returned to the employ of his regular employer.

III. ARGUMENT.

A. EVEN IF IT WERE TO BE ASSUMED THAT RESPONDENT REED'S CONDUCT CONSTITUTED AN UNFAIR LABOR PRACTICE WITHIN THE MEANING OF SECTION 8 (a) OF THE NATIONAL LABOR RELATIONS ACT, SUCH CONDUCT WAS NOT AN "UNFAIR LABOR PRACTICE AFFECTING COMMERCE" WITHIN THE MEANING OF SECTION 10 (a) OF THE ACT.

Under Section 10 (a) of the National Labor Relations Act, the authority of the Board to prevent any person from engaging in an unfair labor practice extends only to an unfair labor practice "affecting commerce" (*Labor Board v. Denver Bldg. Council* (1951), 341 U.S. 675, 683). "Commerce" is defined in the Act as "interstate commerce" (Sec. 2 (6)), and the term "affecting commerce" is defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Sec. 2 (7).)

The activities of respondents in this case clearly were not "in interstate commerce". Therefore, the issue is whether the activities burdened or obstructed interstate commerce or the free flow of such commerce.

The threat of the respondent Union to order its members not to work with the charging party until the latter complied with the Union's rule affected only the work in which those members were then engaged. Such threat was not directed, either by express terms or by reasonable implication, at any other construction work on the Stonestown project or at any operations of respondent Reed other than

those at the place where the charging party was working. By reason of the limited and narrow nature of the dispute, none of these other operations was threatened with obstruction or diminution, and hence none of them should properly be taken into account in determining the potential effect of the dispute upon interstate commerce (*Groneman v. International Brotherhood of Elec. Workers* (10th C.A. 1949) 177 F. (2d) 995).

When consideration is limited to the work on which the charging party was engaged at the time the Union threatened to order its members from the job, there is no evidence whatever to support a finding that the execution of such threat would have burdened or obstructed interstate commerce. Such work consisted of the construction of flower boxes, chimneys and garages entirely with materials from sources within the State of California. There was no showing that any of the other construction work on the project was dependent upon the installation of these items, or that the flow of any material from out of the State to the project would have been stopped or obstructed by delay in the completion of such items.

The Board's assertion of jurisdiction in this case is premised entirely upon the assumed impact that a labor dispute affecting respondent Reed's total annual operations in 1948 and 1949 would have had upon interstate commerce. The Board ignores entirely the fact that its jurisdiction in unfair labor practice cases is not coextensive with the employer's total operations, but is limited by the wording of the statute to unfair

labor practices which in themselves affect interstate commerce (*Labor Board v. Jones & Laughlin* (1936), 301 U.S. 1, 31; *Denver Bldg. & Constr. Tr. C. v. National Labor Rel. Bd.* (App. D.C. 1950), 186 F. (2d) 326, 329-330, *rev'd* on another ground (1951), 341 U.S. 675). In such cases, the volume of the employer's total annual operations is pertinent only where the unfair labor practice is of a nature which can fairly be said to lead or tend to lead to a labor dispute which would burden or obstruct those total operations. As we have demonstrated, the alleged unfair labor practice here involved was limited in its potential impact upon interstate commerce to the specific work being performed by respondent Reed on the Stonetown tract.

The authorities cited by the Board in support of its position do not sustain its assertion of jurisdiction in this case.

In *Labor Board v. Denver Bldg. Council* (1951), 341 U.S. 675, *rev'g* (App. D.C. 1950), 186 F. (2d) 326, the unfair labor practice involved, namely, picketing of a construction project to compel the general contractor to cease doing business with an electrical subcontractor who employed nonunion men, was of such a nature that it threatened to stop the subcontractor's entire operations. The Court of Appeals, in sustaining the Board's assertion of jurisdiction as a "borderline" case, relied heavily upon this fact, saying (186 F. (2d) 330):

> "Such stoppages in the work of this concern [the electrical subcontractor] would in a prac-

> tical and economic sense adversely affect its total business, including its out-of-state purchases. While the actual goods involved at the two sites are not satisfactorily shown to have derived from interstate commerce, the threatened or actual stoppage of work on these and similar projects reasonably should be held to affect significantly the total business of the concern, a substantial part of which is interstate."

The Supreme Court merely upheld the conclusion of the Court of Appeals on this issue, citing the same commerce facts relied on by the lower Court.

In each of the other cases cited by the Board, namely, *Polish National Alliance v. N.L.R.B.* (1944), 322 U.S. 643; *N.L.R.B. v. Fainblatt* (1939), 306 U.S. 601; *N.L.R.B. v. Townsend* (9th C.A. 1950), 185 F. (2d) 378; *N.L.R.B. v. Fry Roofing Co.* (9th C.A. 1951), 193 F. (2d) 324, and *N.L.R.B. v. Holtville Ice & Cold Storage Co.* (9th C.C.A. 1945), 148 F. (2d) 168, the unfair labor practices involved were of such nature that they could reasonably be said to have led or had a tendency to lead to the stoppage of the employer's entire operations, or a portion of such operations directly involving the interstate shipment of goods.

In the *Polish National Alliance* case the Court pointed out that a stoppage or disruption of work resulting from an effective strike against the Alliance would involve "interruptions in the steady stream, into and out of Illinois, of bills, notices and policies, the payment of commissions, the making of loans on

policies, the insertion and circulation of advertising material in newspapers, and its dissemination over the radio" (322 U.S. 645).

In the *Fainblatt* case, the Court, in sustaining the jurisdiction of the Board, referred specifically to the Board's finding that the employer's unfair labor practices had led to a strike in its tailoring establishment which cut its overall output by about 50 per cent (306 U.S. 608-609).

B. RESPONDENT REED'S CONDUCT WAS NOT AN UNFAIR LABOR PRACTICE WITHIN THE MEANING OF SECTIONS 8 (a) (1) AND 8 (a) (3) OF THE ACT, SINCE SUCH CONDUCT DID NOT HAVE THE PROXIMATE AND PREDICTABLE EFFECT OF ENCOURAGING OR DISCOURAGING MEMBERSHIP IN THE HOD CARRIERS UNION.

The Board in its brief has interpreted respondents' activities as an attempt to operate under closed shop conditions, and has cited numerous authorities to the effect that a closed shop is no longer permissible (pp. 10-13).

Clearly, however, there was no attempt in this case to enforce closed shop conditions. The charging party was already a member of the respondent Union, and therefore the threats of the business agent were not directed at preventing a non-member of the Union from securing or retaining employment.

The Union had adopted a rule which required that when a member moved to a new job, he report such fact to the Union and obtain a "clearance". The

charging party, as a long-time member of the Union, had participated in the adoption and maintenance of such rule. He had the power to comply with the rule, and the clearance was his for the asking. Until he complied with the rule, his fellow Union members would not work with him.

In this situation respondent Reed was powerless to protect the charging party. The bricklayers could not proceed for any length of time without the hod carriers (R. 80). The charging party could not do the work of the full crew of hod carriers, so that the practical choice presented to respondent Reed was either to lay the charging party off until he straightened out his difficulty with the Union or suspend his operations. Respondent chose the former course. In so doing he acted solely for the purpose of keeping his job going, and with no intent or purpose of discouraging or encouraging the charging party's membership in the Union (R. 159).

Obviously, since the charging party was a member of the respondent Union and had been a member for many years, respondent Reed's action did not encourage such Union membership. Neither did respondent's action encourage Union membership on the part of any of the other hod carriers on the job, since undisputed evidence established that all of these men were members of the Hod Carriers Union and had been such for years (R. 81).

By reason of this undisputed evidence, the Board is relegated to the argument that respondent violated Sections 8 (a)(1) and 8 (a)(3) because its action en-

couraged the charging party and the other hod carriers on the job to comply with the rules established by their own Union. Such an argument, we submit, gives a strained and unnatural meaning to the words of the statute.

Section 8(a)(3) forbids an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage *membership in any labor organization*".* It permits an employer to enter into a union-shop agreement with a labor union under specified circumstances, but it stipulates that notwithstanding such permission "no employer shall justify any discrimination against an employee for *nonmembership in a labor organization* * * * (B) if he has reasonable grounds for believing that *such membership was denied or terminated* for reasons other than the failure of the employee" to tender dues and initiation fees.

The Board asks this Court to ignore the plain language of the Section, and to construe its provisions as a general and all-embracing prohibition against any act by an employer which would encourage his employees to comply with any rule of their own Union, other than the rule requiring payment of dues and initiation fees.

This request has already been rejected by the Court of Appeals for the Eighth Circuit, and we respectfully submit that it should be rejected by this Court.

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*Throughout this brief, emphasis is ours unless otherwise noted.

In *National Labor Relations Board v. Del E. Webb Const. Co.* (8th C.A. 1952), 196 F. (2d) 702, the Board found the respondent employer guilty of a violation of Sections 8(a)(3) and 8(a)(1) of the Act because it had yielded to a demand of the Operating Engineers Union that it lay off a member of the apprentice unit of the Union to make a place for a journeyman member of the Union. A Union rule gave journeymen seniority rights over apprentices. The apprentice could not become a journeyman member of the Union because he could not meet the eligibility requirements of the Union.

The Court of Appeals denied the Board's petition for enforcement of its order, saying (pp. 705-706):

> "Pickard could scarcely have been encouraged to become a journeyman member of respondent union because under no circumstances could he become such member. His status so far as union affiliations were concerned, was fixed and could not be changed at least by any act of the respondent company. It can scarcely be said that one may effectively be encouraged to do or not to do that which he is incapable of doing.
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> * * * * * * *
>
> "So in the instant case, it being impossible for Pickard to become a member of the respondent union, nothing that respondent company might do by way of discriminating against him could be said proximately to encourage him to join a union which was impossible for him to join. *There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging*

membership in a labor organization. N.L.R.B. v. Winona Textile Mills, 8 Cir., 160 F. 2d 201; N.L.R.B. v. Potlatch Forests, 9 Cir., 189 F. 2d 82; Western Cartridge Co. v. N.L.R.B., 7 Cir., 139 F. 2d 855.

"In this view of the law it is not, we think, as we have already observed, material whether Local 101 and Local 101-B are the same or different unions. Members of respondent union are skilled craftsmen. There is provision for an orderly promotion from the apprenticeship stage to the journeyman status, after which a member may properly be regarded as a master craftsman. Nothing in the National Labor Relations Act prevented a union from adopting rules of its own as to distribution of work among its members. *No one is required to join the union and subject himself to such rules and regulations; neither is there any inhibition against his withdrawing from the union if such rules and regulations are not satisfactory to him.*

"We conclude that the termination of Pickard's employment did not reasonably tend to encourage membership in respondent union or to discourage membership in Local 101-B within the purview of the National Labor Relations Act. The petition to enforce the cease and desist order of the National Labor Relations Board is therefore denied."

In this case, as in the *Webb Construction Company* case, respondent's conduct could not possibly have encouraged membership in the Union. In the *Webb Construction Company* case the reason was that the charging party was not eligible for membership in

the journeyman branch of the Union. In this case the reason is that the charging party was already a member of the Union, and evidenced no desire or inclination to withdraw from the Union, notwithstanding its clearance rule. As the Court of Appeals for the Eighth Circuit pointed out in another case involving the Webb Construction Company, *Del E. Webb Const. Co. v. National Labor Relations Board* (8th C.A. 1952), 196 F. (2d) 841, at page 848:

> "it is difficult to see how the Company's action may be said 'to encourage * * * membership in any labor organization', as charged by the Board, and which must be found if there is to be a Section 8(a)(3) violation. The men were already members of the Union, and in the absence of a showing that only union men were to be hired (a fact not proved herein as shown in the discussion of Point 1), *it is difficult to see how the men would be encouraged to retain membership (which might be held to be a phase of 'encouraging membership') in the Union, which must have seemed to them to be keeping them from employment.*"

If this Court were to adopt the construction of the Act urged by the Board, it would extend beyond any fair limit the principle that an employer must endure the destruction of his business, rather than participate in an unfair labor practice (*National Labor Relations Board v. Lloyd B. Fry Roofing Co.* (9th C.A. 1951), 193 F. (2d) 324, 327). An employee who has been denied or deprived of membership in a union for reasons other than failure to meet reasonable

financial obligations is helpless to protect himself against discriminatory action by the union. Therefore, it is reasonable to require that the employer protect such employee's right to work against the demands of the union. Where the employee is a member of the union, however, it is within his power to protect himself, by compliance with the union's rules, against the refusal of his fellow members to work with him. The Act does not expressly say that in such situation the employer must suffer loss to protect the employee against the consequences of the latter's nonconformance, and there is no compelling reason to be found, either in the letter or the policy of the statute, why such a requirement should be read into the Act by this Court.

C. THE ORDER IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW FOR THE REASON THAT IT WAS ISSUED AT A TIME WHEN EMPLOYERS (SUCH AS RESPONDENT REED) AND UNIONS IN THE BUILDING AND CONSTRUCTION INDUSTRY WERE BEING EFFECTIVELY DENIED THE BENEFIT OF THE ELECTION PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT. THE ENFORCEMENT OF THE UNFAIR LABOR PRACTICE PROVISIONS OF THE ACT IN SUCH CIRCUMSTANCES IS CONTRARY TO THE INTENT OF CONGRESS, AND A DENIAL OF DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Under the National Labor Relations Act, the Board is charged with two principal functions. One is "the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of em-

ployees" (*A. F. of L. v. Labor Board* (1940), 308 U.S. 401, 405). The other is "the prevention by the board's order after hearing and by a further appropriate proceeding in Court, of the unfair labor practices enumerated in Section 8" (*A. F. of L. v. Labor Board, supra).*

In *The Plumbing Contractors Association of Baltimore, Maryland, Inc.* (1951), 93 N.L.R.B. 1081, the Board held, with respect to the building and construction industry, that Congress did not intend that it should perform the second of these functions, namely, the prevention of unfair labor practices, while it was neglecting to perform the first of these functions. It said (pp. 1085-1086):

> "As the Board has pointed out in earlier cases involving the building and construction industry, the legislative history of the amended Act clearly establishes the intent of Congress in 1947 that the Board should assert jurisdiction in that industry for the purpose of preventing certain unfair labor practices by labor organizations. Consistent with that intent, the Board has asserted jurisdiction in unfair labor practice cases arising under Section 8 (b) (4) of the Act, when such assertion was appropriate on the basis of the commerce facts established therein. In addition, however, to proscribing certain conduct by labor organizations, Section 8 (b) (4) excepts from such proscription, or grants certain benefits to, a labor organization which has been *certified* pursuant to Section 9(c). Section 8(b) (2), when read in conjunction with Section 8(a)(3), grants to a labor organization which has been *certified* pur-

suant to Section 9(e)(1) the right to enter into and enforce a union-security contract. **If, as we think it must, the Board is to continue in appropriate cases to process complaints and issue cease and desist orders against labor organizations in the building industry, it would be most inequitable for the Board, at the same time, to deny to labor organizations the benefits which accrue from certification when, in appropriate cases, our jurisdiction is invoked. We do not believe that Congress intended that in this industry the Board would wield the sword given it by the Act, but that labor organizations desiring it should be denied the shield of the Act.** We believe, rather, that in providing that certain benefits would flow from certification, Congress intended that the shield should go with the sword, and that the Board should to this end assert jurisdiction in representation and union-security authorization cases to the same extent and on the same basis as in unfair labor practice cases. **Unless and until Congress, for reasons of policy, provides otherwise by appropriate legislation, we must proceed on that basis. We could not take any other course without flouting the will of Congress as now expressed in the 1947 statute."**

The decision in the *Baltimore Plumbers* case, quoted *supra,* was announced more than three and one-half years after the effective date of the Labor Management Relations Act and almost three years after the Board's decision in *Ozark Dam Constructors,* June 16, 1948, 77 N.L.R.B. 1136, when the Board first announced its departure from its former policy of not asserting jurisdiction over the building and construc-

tion industry. Notwithstanding the *Baltimore Plumbers* decision, the Board has not yet devised workable election procedures applicable to the great bulk of the employers and unions in the industry. Nevertheless, the Board continues to process and press unfair labor practice charges against such employers and unions.

It may be conceded that the Board was not required to apply the election provisions and the unfair labor practice provisions of the Act to the building and construction industry simultaneously. In view of the complexities involved in setting up workable election procedures, a degree of "administrative lag" is excusable. But, as experience has demonstrated in this very industry, any appreciable lag between the application to an industry of the unfair labor practice provisions of the Act and the application of the election provisions thereof disrupts rather than stabilizes labor-management relations in the industry. See Senate Report No. 1509, May 5, 1952, on S. 1973, 82d Cong. 2d Sess.*

In the administration of the National Labor Relations Act, specifically including the unfair labor practice provisions of the Act, the Board acts under a

*In this report, which was with respect to proposed amendments to the Labor Management Relations Act relating specifically to the building and construction industry, the Senate Committee on Labor and Public Welfare reported as follows:

> "These amendments are intended to remedy the hardships and disruption of labor relations which have resulted from the proven impracticability of accommodating the normal doctrines and election procedures of the National Labor Relations Act to the building and construction industry."

broad delegation by Congress of authority to effectuate the policies of the Act (Act, Sec. 10(c); *Labor Board v. Fansteel Corp.* (1939), 306 U.S. 240, 257; *Southern S. S. Co. v. Labor Board* (1942), 316 U.S. 31, 47; *Pittsburgh Glass Co. v. Board* (1941), 313 U.S. 146, 165). The basic policy and primary objective of the Act is to stabilize labor-management relations (*Colgate-Palmolive-Peet Co. v. National Labor Relations Board* (1949), 338 U.S. 335, 362). Therefore, where it is demonstrated that a decision and order of the Board under the Act disrupts rather than stabilizes such relations in an industry, remedial amendment of the Act by Congress is not required, but the Courts have full power to deny enforcement of the decision and order of the Board on the ground that it is in excess of the Board's delegated authority (*Labor Board v. Fansteel Corp.* and other authorities cited *supra; National Labor Relations Board v. Flotill Products* (9th C.A. 1950), 180 F. (2d) 441, 444).

Further, if the Act were to be construed as giving the Board discretion to withhold the "shield" from the building and construction industry while wielding the "sword" therein, such a construction would render the Act void as violative of due process of law. There could be no reasonable justification for such a discriminatory treatment of a single industry. The Act was enacted for the purpose of protecting and preserving the important contract rights flowing from collective bargaining (*Edison Co. v. Labor Board* (1938), 305 U.S. 197, 238). Management and labor in the building and construction industry are as much

entitled to the protection of such rights as management and labor in other industries, and the application of the Act to them in such a way as to emasculate these rights without providing any means for protecting and preserving them would constitute discrimination "gross enough * * * as equivalent to confiscation and therefore void under the Fifth Amendment" (see *Hamilton Nat. Bank v. District of Columbia* (App D.C. 1946), 156 F. (2d) 843, 846 (1949), 176 F. (2d) 624, *cert. den.,* 338 U.S. 891).

D. IN THE EVENT ENFORCEMENT OF THE BOARD'S ORDER IS DIRECTED, RESPONDENT REED'S LIABILITY FOR BACK PAY SHOULD BE LIMITED TO THE LOSS OF PAY ATTRIBUTABLE TO HIS CONDUCT; NAMELY, SUCH LOSS OF PAY AS THE CHARGING PARTY MAY HAVE SUFFERED BETWEEN JUNE 14, 1949, THE DATE OF HIS LAYOFF, AND JUNE 24, 1949, THE DATE ON WHICH THE CHARGING PARTY, IN THE NORMAL COURSE OF EVENTS WOULD HAVE RETURNED TO THE EMPLOY OF HIS REGULAR EMPLOYER.

The Trial Examiner recommended (R. 40), and the Board ordered (R. 58-60), that respondent Reed and the respondent Union, jointly and severally, pay the charging party a sum of money equal to that which he would normally have earned as wages from the date of his discharge (layoff) to the date of an offer of reinstatement from respondent Reed.

Insofar as respondent Reed is concerned, this order, if enforced, would require him to reimburse the charging party for substantially more than the charging party lost as the result of any conduct on respondent

Reed's part. In accordance with past practice, respondent Reed had borrowed a crew of three men, including the charging party, from another masonry contractor upon the understanding that the men could be recalled by the latter at any time. The two men who were thus borrowed and continued in respondent's employ after the date of the charging party's layoff were recalled by their regular employer on June 24, 1949. At that time the regular employer needed hod carriers and would have employed the charging party if he had applied for work, but the charging party did not seek employment from him.

In view of these circumstances, the award of back pay against respondent Reed for any period after June 24, 1949, is punitive, rather than remedial, and is not authorized by the Act (*Republic Steel Corp. v. Labor Board* (1940), 311 U.S. 7, 11; *Phelps Dodge Corp. v. Labor Board* (1941), 313 U.S. 177, 199; *National Labor Relations Board v. Wilson Line* (3rd C.C.A. 1941), 122 F. (2d) 809, 813; *National Labor Relations Board v. Planters Mfg. Co.* (4th C.C.A. 1939), 106 F. (2d) 524).

IV. CONCLUSION.

For the foregoing reasons, we respectfully submit that this Court should set aside the Board's order in this proceeding. In the alternative, we submit that if enforcement is directed, the Court should modify the order to provide that the direction concerning the payment of back pay be limited, insofar

as respondent Reed is concerned, to the period from June 14, 1949 to June 24, 1949.

Dated, San Francisco, California,
October 27, 1952.

GARDINER JOHNSON,
THOMAS E. STANTON, JR.,
Attorneys for Respondent George W. Reed.

No. 13,310

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GEORGE W. REED and INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION LOCAL NO. 36, A.F.L.,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR THE RESPONDENT, INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, A.F.L.

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No. 13,310

IN THE

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GEORGE W. REED and INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION LOCAL No. 36, A.F.L.,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR THE RESPONDENT, INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, A.F.L.

The Brief for Respondent Union herein is in answer to the petition for enforcement of an order by the National Labor Relations Board to the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT.

I. Respondent Reed's interstate operations were so insubstantial as to have only a *de minimis* effect upon commerce, therefore the Board lacked jurisdiction to entertain the complaint under Section 10 (a) of the Act.

(a) In any event, the action of the Board is arbitrary, capricious and an abuse of its discretion when it applies its newly announced jurisdictional yardsticks to conduct occurring prior to the establishment of said jurisdictional policy.

II. The action of the Respondent Union did not encourage or discourage Union membership so as to violate the Act, in that the charging party was and continued to remain a Union member; such conduct did not violate Section 8(b) (2) and (1) (A) of the Act.

III. The Board's request for enforcement of an order to make whole the pay suffered by a temporary employee from the date of his alleged discharge to the offer of his reinstatement, is punitive rather than remedial in its nature, when said temporary employee's employment would have terminated in all events prior to said offer of reinstatement.

STATEMENT OF FACTS.

The charging party, Sydney Ernest Charlton, was a member of the Respondent Union continuously since 1906, a period of 42 years (R. 173). He had not re-

signed therefrom at the date of the hearing (R. 174) and was still a member thereof at said date (R. 182). He alleged he was discharged by Respondent Employer on June 19, 1949, because the Union insisted he have a clearance card before going to work (R. 6). The job from which the alleged discharge was effected was the Stonestown Development Project, a large residential apartment house development in San Francisco (R. 176-177). The charging party was only hired temporarily by the Respondent Employer (R. 160).

The interstate commerce facts pertaining to Respondent Employer, who was a local sub-contractor, instead of being developed upon the customary one year basis, were developed for a two and one-half year period, namely, 1948, 1949, and about six months of 1950 (R. 87-88).

During 1948, the following interstate commerce factors appear:

(a) No out of State sales made and no out of State services performed by Respondent Employer (R. 103);

(b) No out of State purchases made (R. 103);

(c) All materials purchased were manufactured from natural ingredients found in California (R. 101-102);

(d) Two jobs were done for public utilities, one for the Pacific Telephone & Telegraph at the contract price of $148,000.00 (R. 89-90); the

other for the Pacific Gas & Electric Company at the contract price of $63,000.00 (R. 91).

In 1949, Respondent Reed's interstate commerce factors were as follows:

(a) Respondent Reed did a gross business of $481,869.00 (R. 106); only $80,454.00 of this total represented the cost of materials (R. 99), leaving the balance of $401,415.00 attributable to labor costs, overhead and profits;

(b) No out of State sales were made and no out of State services were performed (R. 103-104);

(c) Only one out of State purchase made from Indiana, in the sum of about $1,900.00 (R. 100);

(d) All other material bought, was manufactured in California from the natural resources of this State (R. 101-102);

(e) The following large jobs were done at the contract price indicated;

(1) Pac. Tel. & Tel. Co. . . . .$150,000.00 (R. 95)

(2) Stonestown Department Project . . . . . 100,000.00 (R. 96)

(3) Standard Oil Building 200,000.00 (R. 98)

(4) Macy's . . . . . 57,000.00 (R. 97)

For the six months period of the year 1950, Respondent's operations indicated that:

(a) No materials were purchased out of State (R. 103);

(b) No contract was made for sales or services out of the State (R. 103);

(c) There were no jobs for public utilities or interstate commerce activities.

The chief materials used by the Respondent Reed during all the times mentioned, were, mortar, tile, terracotta, glazed tile (R. 87). There were no labor disputes with Respondent Reed for thirty years, outside of this one in question (R. 105).

The Trial Examiner provided that the charging party be made whole by payment to him of a sum of money equal to that which he would have normally earned from the date of his discharge to the date of the offer of his reinstatement (R. 40); the Board in its decision affirmed to all practical purposes that order (R. 58).

ARGUMENT.

POINT I.

RESPONDENT REED'S INTERSTATE OPERATIONS WERE SO INSUBSTANTIAL AS TO HAVE ONLY A DE MINIMIS EFFECT UPON COMMERCE, THEREFORE THE BOARD LACKED JURISDICTION TO ENTERTAIN THE COMPLAINT UNDER SECTION 10 (a) OF THE ACT.

It is most apparent from the recent decisions of our Supreme Court of the United States, that the power of Congress to legislate under the commerce clause has been broadened to the extent that the line of demarcation between intrastate and interstate commerce has become so thin as to be for all purposes

non-discernible. As aptly stated, Congress has plenary power to control commerce. However recognizing these premises, the Supreme Court has been careful to point out that there is some measure of limitation reserved by our Courts which would leave some remnant of jurisdiction to the State Governments, in which area the Federal Government might not legislate.

In *N.L.R.B. v. Jones & Laughlin Steel Corp.* (1937), 301 U.S. 1, 31, the Supreme Court stated:

> "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. *Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce.* It purports to reach only what may be deemed to burden or obstruct that commerce, and thus qualified it must be construed as contemplating the exercise of control within constitutional bounds."

Later the Supreme Court had occasion to consider just what type of constitutional limitations remained and the application of the *"de minimis"* doctrine to the National Labor Relations Act was announced. The Supreme Court stated in the important decision of *National Labor Relations Board v. Fainblatt* (1939), 306 U.S. 601, 607, the following with respect to the *"de minimis"* doctrine:

> "Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the

> light of its purpose and of the circumstances in which it must be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts *would apply the maxim de minimis*".

In a rather recent decision concerning the interstate commerce factor under the National Labor Relations Act, decided on November 4, 1949 by the U.S. Circuit Court of Appeals for the 10th Circuit, a case involving a local construction contractor who purchased $6000.00 worth of materials in one year outside of his State. The Court stated:

> "Considered in the light most favorable to appellant the impact of this labor dispute upon commerce, in any event, is as trifling and microscopic as to bring it within the above pronouncement by the Supreme Court (referring to *N.L.R.B. v. Fainblatt* (1939), 306 U.S. 601) and *requires the application of the de minimis doctrine.*"
>
> *Groneman v. International Brotherhood of Electrical Workers* (C.C.A.-10; 1949), 177 F. (2d) 995, 997.

In evaluating the weight to be given to the 10th U.S. Circuit Court of Appeals decision in *Groneman v. International Brotherhood of Electrical Workers,* supra, it is important to note that that Court considered three (3) cases on the interstate commerce question in the building industry since the 1947 amendments to the Act. Its attitude has not been one that might be typified as a liberal policy of

excluding cases from under the Act, but rather a strict approach of asserting jurisdiction wherever possible, as for example in its earlier decision of *United Brotherhood of Carpenters and Joiners v. Sperry* (C.C.A.-10; 1948), 170 F. (2d) 863, 867, the Court enunciated the principle that the commerce power under the Act extended to activities which in isolation might be deemed to be purely local.

It is fully appreciated that the application of this *de minimis* doctrine may be fraught with difficulty under a particular set of facts. However, in the instant case it appears inconceivable that such difficulty exists. The credible and material facts indicate that Respondent Reed in a period of 2½ years made no sales out of State, nor did he perform any contracts out of State. In a period of 2½ years he made no out of State purchases except a minor one for $1900.00 in the year 1949. All the materials he purchased in the 2½ years were manufactured locally from local raw materials. The greater portion of his contract price in all cases was the cost of his labor, with smaller amounts thereof representing his overhead and profits—as witness the fact that in 1949 his total gross business was $481,869.00, of which only $80,454.00 represented the cost of materials (R. 106).

In the six months period for the year 1950 that was considered by the Board, there is absolutely no interstate activity by the Respondent Employer in any single iota. No services were performed out of State and no sales were made out of State. No materials were purchased out of State. All materials used were

manufactured in California, from the natural resources of our State. Additionally no jobs were performed for public utilities or instrumentalities of commerce, nor were there prospective contracts for such agencies for the balance of that year.

Of all the cases deciding the interstate commerce issue under the Act since the 1947 Amendments, whether decided by our Federal Courts or by the Board, there appears to be none that have lower interstate commerce factors than the instant case.

Our Supreme Court has very recently passed upon the interstate commerce issue in three companion cases that arose out of the building construction industry. In all three cases jurisdiction was accepted under circumstances wherein at first blush it might appear that the interstate commerce factors were balanced with those of the instant case. However, a close analysis of each case readily distinguishes those cases from the instant one on the facts.

In the first of the three said cases, namely, *N.L.R.B. v. Denver Building & Construction Trades Council* (1951), 341 U.S. 675, the interstate commerce facts are much stronger than the instant one. In the *Denver Building Trades* case, supra, the Respondent Employer shipped $5000.00 worth of products out of the State annually; likewise he purchased $86,560.30 of raw material of which 65% or $55,745.25 were purchased out of State. In the instant case there were no out of State sales and only one interstate purchase of $1900.00 in the whole period of 2½ years.

In the second of these companion cases, the case of *I.B.E.W. Local 501 A.F.L. v. N.L.R.B.* (1951), 341 U.S. 694, the subcontractor on a construction job was performing $320.00 worth of work on a $15,200.00 private dwelling; the Court felt that the fact that the subcontractor and general contractor on the job were both out of State contractors and supplied materials on their jobs from out of State; that thereby such factors sufficiently affected commerce so that jurisdiction should be taken. In the instant case we have strictly a local San Francisco Bay area contractor, who at the maximum has traveled only to several jobs within this State and approximately 100 miles from San Francisco, at all times using for all purposes strictly intrastate materials.

In the third of these three companion cases, the case of *Local 74, United Brotherhood of Carpenters, A.F.L. v. N.L.R.B.* (1951), 341 U.S. 707, the Court held in effect that the application of the amended Act does not, *within limits of amounts too insignificant to merit consideration,* depend upon any particular volume of commerce affected. A labor dispute involving a store which engages in selling and installing wall and floor covering, sufficiently affects commerce to be within the scope of the Act, where, during a seven month period, the store purchased over $93,000.00 worth of goods, 33% of which were shipped to it from outside of the State, and an additional 30% of which were manufactured outside of the State; where the store did $100,000.00 worth of business of which 8% represented sales and installations

outside of the State, and where the store was an integral part of a system of 26 or 27 stores in seven different States.

It is readily apparent that the interstate activity of this last case far exceeds the instant case, when in the latter only $1900.00 of materials in 2½ years were purchased out of State.

The Board in developing evidence upon the interstate commerce issue introduced evidence of all the materials sent to all the jobs done by Respondent Reed, such as the materials purchased for the Stonestown project as well as the Standard Oil Building, and the Pacific Telephone & Telegraph Company buildings. It must be recalled that most of these jobs were completed at the time of the alleged unfair labor practice, and no dispute arose on any of these jobs at any time except at the Stonestown project out of which this case arose. It is respectfully submitted that the criteria of whether interstate commerce is affected or not, is the interstate commerce activity of the particular employer involved in the dispute, not the business operations of all others whom the instant employer may brush lightly or otherwise in his business dealings. The dispute at Stonestown involved only Respondent Reed as a sub-contractor there; the dispute did not involve the general contractor of the job or the latter's men.

The attempt to attribute to the Respondent Employer all the interstate operations of all others remotely connected with the case, not parties to the action, and who have no sufferance in any manner

with the dispute, exceeds the customary scope of interstate commerce operations chargeable to a single employer. As was stated by dissenting Judge C. J. Waller in *Shore v. Building & Construction Trades Council of Pittsburgh* (C.C.A.-3; 1949), 173 F. (2d) 678, 683:

> "The consideration by the Board of all the materials purchased, regardless of time or use by the contractor, the sub-contractor, and the merchants who sold to the contractor and sub-contractor during the year is comparable to the razor-back sow, which, in making her bed in the woods, indiscriminately rakes together all the available vegetables, leaves, sticks and straws, into a pile large enough to allow her to take refuge therein. * * * and if the interstate commerce of merchants who are wholly disconnected with the controversy can be accumulated to show substantiality, then not only every merchant employer, from Bill Grimes at the cross road near Yellow Rabbit to John Wanamaker of Philadelphia, whose sales are derived in part from commodities acquired from out of the State, but every employer who buys from such merchant any such materials to use in the construction of any store, whether it be that of Bill Grimes or that of John Wanamaker, would be under the jurisdiction of the Board. * * * It seems to me unnecessary to make excursions into the chimerical in order to give the Act the reasonable and practical enforcement that should be ascribed to the intent and purpose of Congress."

It is submitted that it is readily obvious that to obtain proof or to be able to adequately prepare a

defense to the evidence of interstate commerce activity of all persons remotely or otherwise connected with a case would be so overwhelming as to amount to a denial of justice to defending litigants.

The Board in the instant case assumed jurisdiction in accordance with the newly established jurisdictional standards just promulgated in its decision of *Hollow Tree Lumber Company* (Oct. 3, 1950), 91 N.L.R.B. 635, and as further released by the Board on October 6, 1950, to the press. The basis of the Board's asserting jurisdiction herein was that Respondent Reed furnished services or materials necessary to the operation of other employers engaged in commerce, such goods or services being valued at $50,000.00 per annum or more and being sold to public utilities, or to enterprises engaged in producing or handling goods destined for out of State shipment, or performing services outside the State in the value of $25,000.00 or more. As to the latter standard the record as a whole fails to disclose that any enterprise such as the Standard Oil Company, did or did not, about the time of this dispute perform services or make sales outside of the State of California in the value of $25,000.00 or more. Unless assumptions are to take the place of evidence, then in this one particular regard the Board on the face of the record as a whole has failed to prove its contentions.

Rationalizing upon another approach to the problem, the Act requires a showing that a labor dispute would *"affect"* commerce. It is most difficult to see how the mere proof of work having been or being

accomplished upon a new building constructed for a public utility would in itself affect commerce. A labor dispute on such unfinished building would not cut off one telephone or one electric light in the case of the Pacific Telephone Company or the Pacific Gas and Electric Company. At the time of the construction of a building all their activities were in operation unabated elsewhere in the city or area. Materials to be used at said building would not be interrupted in their inflow to the State, unless one assumes that the particular railroad or ship carrying such was required to end its journey at the building site. One cannot argue that the materials would not continue their transportation into the State. The most that can be said is that a labor dispute might to some slight degree affect some planned expansion of facilities for interstate use. A building erected for the sole purpose of providing more comfortable and finer appearing office quarters, or because of financial consideration to the public utility, such as for example, the saving of rental costs, certainly would not be one that contributed anything to commerce; any contrary reasoning in such case would be unrealistic and based upon mere conjecture, surmise and guess. Without proof in the record therefor of some of the aforesaid premises, surely the Board has failed in the instant case to definitely prove an effect upon interstate commerce. There is no presumption in fact or law that every building constructed for a public utility or a instrumentality necessarily contributes something or anything to commerce.

The performance of work and sale of materials in 1948 and 1949 (none in 1950) by Respondent Reed for the certain public utilities, therefore had such a negligible and insignificant effect upon commerce (if any effect at all) as not to be worthy of consideration. Upon the state of the present record, in the instant case, a finding by the Board, that commerce was sufficiently affected, was based wholly on conjecture, surmise and guess; upon which basis no decision can stand.

(a) In any event, the action of the Board is arbitrary, capricious and an abuse of its discretion when it applies its newly announced jurisdictional yardsticks to conduct occurring prior to the establishment of said jurisdictional policy.

The original dispute in this instant case allegedly occurred on June 14, 1949 (R. 176). The case was heard by the Trial Examiner on July 5, 6 and 7, 1950 (R. 16). The Trial Examiner made his decision in his intermediate report of January 29, 1951 (R. 46) wherein upon the basis of the Board's decision in the *Hollow Tree Lumber Company* (Oct. 3, 1950), 91 N.L.R.B. No. 635 and *Rock Asphalt Inc.* and *General Contracting Employer Association* (Nov. 6, 1950), 91 N.L.R.B. No. 228, the Trial Examiner and subsequently the Board (R. 56) accepted jurisdiction of the instant case upon their findings that Respondent Reed sold $50,000.00 worth of material or services to (1) public utilities, (2) to instrumentalities of commerce, and (3) to enterprises which produce or handle goods destined for out of State shipment, or perform services outside a State, where the goods or services are

valued at $25,000.00 a year. The Board on Friday, October 6, 1950, announced through the medium of a morning press release, the adoption of its new standards or jurisdictional yardsticks (R. 27).

The Respondent Union takes the position that this establishment of new standards was in effect a legislative act by the Board and that such standards were retroactively applied to the operation of the Respondent Employer, and therefore the Board's action was arbitrary, capricious and an abuse of its discretion. It must be recalled that the alleged conduct of the Respondents took place on June 14, 1949, and in the interim, while the Board's decision was pending in this instant case, the new jurisdictional standards were established, to wit, by decision on October 3, 1950, and further by the public newspaper release on October 6, 1950; this total action in effect was a legislative act by the Board. This appears to go beyond the making of a quasi judicial decision which might operate retroactively, but we have the additional announcement to the public through the press by the Board, that it has now established definite jurisdictional yardsticks with respect to the interstate commerce problem.

The Respondent Union is aware that decisions may be made that in their result may have a retroactive effect and yet not be objectionable, but the Board's new jurisdictional standards went beyond the making of a mere decision. The Board saw fit to announce *a new policy to the public* which it would henceforth

carry out in all cases. The retroactive application of such a new policy or plan would be inequitable.

Respondent Union cites just one decision on behalf of its position, the recent decision of our Ninth Circuit Court in *N.L.R.B. v. Guy F. Atkinson Co.* (C.A. 9; Feb. 29, 1952), 195 F. (2d) 141, 148. That case involved the Board applying a new jurisdictional policy retroactively to a building and construction industry case. The alleged conduct which resulted in the unfair labor practice involved, occurred at a time prior to the Board's new policy of accepting jurisdiction in the building and construction industry. Our Court stated therein as follows:

> "When it comes to adjudication of charges incorporated in a complaint designed to apply sanction because of alleged unfair labor practices, the question is whether the Board could *apply a policy rule which had not been published by it prior to the commission of the acts complained of* * * * We think it apparent that the practical operation of the Board's change of policy when incorporated in the order now before us, is to work hardships upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the Act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors."

The decision appeared to establish the rule that a reviewing Court may set aside an order of an administrative agency if the action of the agency is arbitrary, capricious or an abuse of discretion, provided that such agency action is not committed by law to the agency's discretion. The Court stated that the action of the Board in retroactively applying its policy to exercise jurisdiction in the building and construction industry to conduct resulting in a complaint, which conduct occurred prior to the establishment of the said policy (even though no prior proceeding had ever been brought against the Respondent) was arbitrary, capricious and an abuse of discretion and the Court would therefore not enforce the Board's order.

Respondent Union contends that if the instant case had been decided prior to the establishment of the Board's new jurisdictional yardsticks, under its prior policy and decisions, the Board would not have accepted jurisdiction in this matter.

A diligent search has been made of cases decided by the Board, arising out of the building and construction industry, involving like materials as the instant action. These cases were particularly decided after the Board accepted jurisdiction in the said industry, and prior to its newly announced standards; such cases fail to reveal to Respondents, any case with lower interstate commerce factors than the instant one.

A few of the Board's cases are illustrative of the above premises. In *Tampa Land & Material Co. Inc.*

(decided July 28, 1948), 78 N.L.R.B. No. 74, jurisdiction was refused by the Board wherein the facts indicated the manufacturers sold cement, tiles, concrete blocks, in the annual amount of $1,000,000.00 25% of which were for use in *commercial construction and improvements.* Sales included cement in building and construction in the local area, to *the U. S. Army, to interstate transportation lines and to nationally known interstate organizations.*

Likewise in *Texas Construction Material Co.* (decided Dec. 13, 1948), 80 N.L.R.B. No. 187, the Board refused jurisdiction over an employer who produced, sold and distributed sand and gravel for construction purposes, making sales annually to the value of $1,200,000.00 to customers who made redi-mix concrete *for all types of buildings, including highways and bridges.*

In *Knoxville Sangravl Material Co. Inc.* (decided Dec. 27, 1948), 80 N.L.R.B. No. 227, jurisdiction was refused over a producer of sand, gravel ready-mixed concrete, cement and lime, who sold annually $650,000.00 of its products, of which *72% was used for all types of local building and construction, and about 6% was used for road building and the remainder sold to contractors, railroads and the Tennessee Valley Authority,* which used such for building and construction purposes.

The following is one of the late cases decided by the Board, just prior to the adoption of its jurisdictional standards (said standards being announced

Oct. 3, 1950, in *Hollow Tree Lumber Company,* 91 N.L.R.B., 635, 636, and by further press release on October 6, 1950): *Arthur B. Woods, et al. dba Valley Concrete Co.* (Feb. 7, 1950), 88 N.L.R.B. No. 116, where jurisdiction was not assumed over an employer processing sand, gravel and selling redi-mix concrete even though approximately 50% of its annual sales of $164,306.00 were *divided up in sales made for U.S. Highway maintenance and repairs, maintenance and repair of interstate railroad roadbeds, construction of State bridges and repair and maintenance of State and County roads,* and *sales of about $16,451.00 to four (4) lumber companies who sold in excess of $6,000,000.00 annually of their products* to out of State customers.

It is apparent that the foregoing cases involved instrumentalities of commerce, and no doubt much of the material sold in these cases went into buildings constructed for public utilities; additionally the above cases illustrate that substantial amounts of materials were sold to instrumentalities of commerce who performed services or sold goods valued in excess of $25,000.00 out of State.

Measuring the interstate commerce factors of the instant case with those of the Board's cases here cited, the interstate commerce factors of the instant case fall sharply below several of the said Board cases. The Respondents should have been able to rely on those decisions as indicating whether or not the Board had or would take jurisdiction over any labor dis-

pute in the Respondent Employer's business. To change the jurisdictional standards after the alleged conduct violative of the Act allegedly occurred and then to retroactively apply the new policy and standards to the instant case, is most unfair and inequitable. The action of the Board in so doing was arbitrary, capricious and an abuse of its discretion and the Board's order therefore should be denied enforcement.

POINT II.

THE ACTION OF THE RESPONDENT UNION DID NOT ENCOURAGE OR DISCOURAGE UNION MEMBERSHIP SO AS TO VIOLATE THE ACT, IN THAT THE CHARGING PARTY WAS AND CONTINUED TO REMAIN A UNION MEMBER; SAID CONDUCT DID NOT VIOLATE SECTION 8 (b) (2) and (1) (A) OF THE ACT.

The Board charges in its complaint that the Respondent Union caused the Respondent Employer to discriminate against the latter's employees, and in so doing caused said Employer to encourage membership within the Union in violation of Section 8 (b) (2) and (1) (A) of the Act (R. 6). The offense then bears on the question as to whether there was *such encouragement of Union membership.*

The Board in its brief strongly sets forth its position, that the requirement of a *clearance* to a job was the enforcement of closed shop conditions. It is submitted that there is not a scintilla of evidence considering the record as a whole to support the Board's contentions. From the conception of the term "closed shop" its definition simply, was that membership in

the Union was a condition precedent to the securing of a particular job or employment. The problem involved herein is not one of Union membership precedent to the securing of employment, but the dispute arose because of the alleged violation of an internal union rule applicable to its members. The charging party was a Union member, no question arose relative to his being a member before he obtained the job in dispute. Nothing in the record shows any attempt to enforce a clearance condition on any other non-union member seeking employment. An attempt was made to introduce a collective bargaining agreement that was not in effect at the time of the dispute and therefore could not be considered as illustrating any existing condition at the date of the dispute. The Board by their contentions in their brief to the Court, urging that under the facts of this case the Respondents were enforcing closed shop conditions, are in effect asking the Court to rule through the process of judicial interpretation that "white" shall be made to appear "black." Respondent Union contends that no question of "closed shop" exists in the record as a whole, nor can such an inference legally be drawn from the evidence.

As to the *encouragement* of the charging party's membership such an inference is wholly irreconcilable with the evidence as produced. The charging party had been a member of his Local for 42 years; he continued to remain a member after the dispute. He refused to get a "clearance" for the job even after the dispute arose, however, he made no effort to discon-

tinue his membership and it was continued by the Union. If anything, his displeasure with his being required to secure a clearance by the Union should have discouraged his membership. The Board however contends such a requirement encouraged his membership, arriving at their conclusion upon the basis that it was essential for the charging party to continue his membership in order to have continued employment. That premise would imply that the only purpose of Union membership is to secure employment. Respondent Union submits that reasoning is fallacious, in that the prime reason for members desiring to belong to a Union, is to obtain the best possible conditions of employment through effective collective action as opposed to ineffective individual action upon such things as wages, hours and multiple other conditions. That was the prime encouragement to the charging party's being a member of the Union for 42 years, and why he desired to continue his membership. The dispute did nothing whatever to encourage his membership. There is nothing in the evidence as given by the charging party or any other person, that the dispute arising out of the membership rule requiring a clearance to a job by a member, had the effect to encourage the charging party, or any other person's membership in the Union.

The Board in its brief cites *N.L.R.B. v. Walt Disney Productions* (C.C.A.-9; 1943), 146 F. (2d) 44, 49, a case decided by the Court herein to the effect that if encouragement can be reasonably inferred from the circumstances of the discharge, the finding of the

Board is binding upon the reviewing Court. Precisely that is what our Court did state, however, it must be recalled that that decision was made in the year 1943, prior to the Supreme Court's decision in *Universal Camera Corp. v. N.L.R.B.* (1951), 340 U.S. 474, 490, wherein the Supreme Court announced the broadened power of our Appellate Courts in their review of any case from the Board. In that last decision the Supreme Court held that both the Administrative Procedure Act and the Taft-Hartley Act direct that Courts must now assume more responsibility for the reasonableness and fairness of N.L.R.B. decisions than they have in the past. Reviewing Courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Although N.L.R.B. findings are entitled to respect, they must nonetheless be set aside when the record before the Court clearly precludes the Board's decision from being gratified by a fair estimate of the testimony of witnesses or its informed judgment on matters within its special competence or both.

Upon the above case of *Universal Camera Corp. v. N.L.R.B.*, supra, being remanded to the Second Circuit Court of Appeals in *N.L.R.B. v. Universal Camera Corp.* (C.A.-2; 1951), 190 F. (2d) 429, 430, the Second Circuit Court of Appeals held that under the Supreme Court decision considering the amended Act, the reviewing Court is not required to accept completely the determination of N.L.R.B. on issues of fact, at least where they are not made on the basis of the specialized knowledge of the Board. The Court must

determine which issues are not subject to such specialized knowledge. Upon those issues the judgment of the Court is of equal value to that of the Board.

Considering the above decisions relative to the reviewing power of our Court, it appears apparent that the Court herein is not bound by the Board finding that the alleged discriminatory action of the Respondent Employer encouraged either the charging party's membership or any other person's membership in the Union. Such a finding by the Board does not fall within any realm of specialized knowledge that the Board may have superior to that of the Court.

The Respondent Union will cite briefly the decisions herein upon which it relies to support its contention that unless the conduct complained of by the Board is shown by the evidence to *encourage* Union membership the Respondent Union is not guilty of an unfair labor practice.

There appears to be no need to burden this Honorable Court with lengthy argument on the point here contested, in that the decisions appear to be in a state of conflict amongst our various Circuit Courts, which conflict has evidently resulted in our United States Supreme Court granting certiorari in what appears to be two of the conflicting decisions on this point.

In *National Labor Relations Board v. Del. E. Webb Construction Co.* (C.A.-8; 1952), 196 F. (2d) 702, the facts indicated an apprentice belonged to a subsidiary Local of the same Union, which subsidiary Local was composed entirely of apprentices.

An apprentice could not become a member of the parent Local until he had completed his apprenticeship. The charging party, an apprentice, was discharged in accordance with a rule that gave journeymen preference in employment. The Court refused enforcement of the Board's order which charged the Union with violations of Section 8(b) (2) and (1) (A) of the Act; the same section claimed violated by the Respondent Union in the instant case. The Court held that the conduct of the Union and the employer did not *encourage* or *discourage* Union membership, in that the charging party's status was fixed so far as his Union affiliations were concerned, and could not be changed, at least, by any act of the Respondent Company. The apprentice could not be *encouraged* to be a member of the parent Union, because until his training was completed he never could become a member thereof.

In *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.* (C.A.-3; 1951), 187 F. (2d) 547, 551-552, our Third Circuit Court held that a wage raise to union member employees but which was not granted to non-union employees, could not *encourage* or *discourage* membership in the Union as it was a closed Union and the non-union employees were not eligible to join. Reversing the Board's decision the Court held that the non-union employees could not be *encouraged* to join the Union as it was impossible for them to do so.

The Eighth Circuit Court had occasion to consider this problem of *encouragement* or *discouragement* a

second time in *Del. E. Webb Construction Co. v. National Labor Relations Board* (C.A.-8; 1952), 196 F. (2d) 841, 848, wherein it held that an agreement establishing a Union "hiring hall" arrangement (the record as a whole didn't show that the hiring hall was for Union hiring only) did not violate the Act, as to the men involved, in that they were already members of the Union, and it was difficult for the Court to see how they could be *encouraged* to remain members of a Union in which they were having difficulty getting job placements.

The Seventh Circuit Court in *Western Cartridge Company v. N.L.R.B.* (C.C.A.-7; 1943), 139 F. (2d) 855, 859, held that the evidence failed to show that the action of the employer in firing certain employees, members of a group willing to be unionized, *discouraged* membership in a labor organization, where the said discharged employees went on a wild cat strike as individuals and not as members of the Union.

The Eighth Circuit Court in another decision, namely, *N.L.R.B. v. International Brotherhood of Teamsters, etc.* (C.A.-8; April 29, 1952), 196 F. (2d) 1, 4, held that, causing an employer to discriminate against an employee in regard to tenure or condition of employment is not an unfair labor practice unless the discrimination *encourages* or *discourages* membership in a labor organization. Reduction in seniority rating of employees because of his dues delinquency to the Union of which he is a member, constitutes discrimination. However, in the absence of any substantial evidence that such discrimination operated to *en-*

courage or *discourage* membership either on the part of the employee discriminated against or on the part of any other employee, a finding by the Board that the Union committed an unfair labor practice by causing the employer to take such action, is erroneous. The Court pointed out that the testimony of the employee involved shows clearly that this act neither *encouraged* or *discouraged* his adhesion to membership in the Respondent Union.

The Second Circuit Court came to the opposite result of the decisions hereinbefore cited in *Radio Officers Union v. N.L.R.B.* (C.A.-2; 1952), 196 F. (2d) 960, 965, where the Court held that the denial of employment to a union member for his failure to accept union principles and rules *encouraged* membership in the Union.

The last two cited cases are now before the Supreme Court for decision. The Supreme Court has granted certiorari in *N.L.R. B. v. International Brotherhood of Teamsters, etc.* (C.A.-8; 1952), 196 F. (2d) 1, Docket No. 301, on the Board's petition, and has also granted certiorari in *Radio Officers Union v. N.L.R.B.* (C.A.-2; 1952), 196 F. (2d) 960; Docket No. 230, upon the Union's petition for writ of certiorari.

It is submitted that in the instant case the action of the Union did not operate to *encourage* initial union membership, in view of the charging party's membership of 42 years, nor did it *encourage* him to remain a member of the Union. Nothing in the record as a whole, substantiates such *encouragement* of the

employee or any other employee. Any inference drawn from the record herein, can only be supported by sheer *suspicion* and *speculation.* In view of the record as a whole the Respondent Union is not guilty of a violation of Section 8(b) (2) and (1) (A) of the Act.

POINT III.

THE BOARD'S REQUEST FOR ENFORCEMENT OF AN ORDER TO MAKE WHOLE THE PAY SUFFERED BY A TEMPORARY EMPLOYEE FROM THE DATE OF HIS ALLEGED DISCHARGE TO THE OFFER OF HIS REINSTATEMENT IS PUNITIVE IN ITS NATURE, RATHER THAN REMEDIAL, WHEN SAID TEMPORARY EMPLOYEE'S EMPLOYMENT WOULD HAVE TERMINATED IN ALL EVENTS PRIOR TO SAID OFFER OF REINSTATEMENT.

Respondent Union is aware that the amount of back-pay due will become appropriate in a post-decree compliance proceeding. However the Board specifically asked for enforcement of its order which in its tenor determines the total period for which the Respondent shall be liable for back pay. The Trial Examiner's recommended order provided that the charging party be made whole by payment to him of money equal to that which he would *have normally earned from the date of his discharge* to the *date of the offer of his reinstatement* (R. 40); the Board in its decision affirmed to all practical purposes this order (R. 58).

The order is too broad and beyond the power of the Board to make. It appears to Respondent Union that if the order would have provided, in case of the Court's enforcement thereof, that the charging party

be made whole for any loss in back pay that he reasonably suffered by any alleged discrimination, then the Respondent at a post-decree compliance proceeding would not be faced with any possible argument that evidence of temporary employment or other pertinent factors bearing on the back pay based on a lesser time than that of the date of the offer of reinstatement should be precluded. Any other rule would abolish the principle of mitigation of damage.

Back pay can not include payment for time an employee would not have worked even had there been no alleged discrimination.

In *N.L.R.B. v. Cowell Portland Cement Company* (C.C.A.-9; 1945), 148 F. (2d) 237, the Court held that where a company intended to lay off an unsatisfactory worker, at the regular seasonal lay-off, the employee was entitled to back pay from the time of the discriminatory discharge to the time the Company usually commenced its seasonal layoff.

In the instant case the charging party was on loan for a temporary period of time from his former employer (R. 160) along with two other employees. If the evidence so establishes that fact, as Respondent Union contends it does, the liability for back pay would be affected by that fact and must be considered in any back pay determination.

That the Board has authority only to issue orders that are remedial rather than punitive in their nature, is well established (*Phelps Dodge Corp. v. N.L.R.B.* (1941), 313 U.S. 177, 199; *National Labor Relations*

Board v. Planters Mfg. Co. (C.C.A.-4; 1939), 106 F. (2d) 524). If the order for which enforcement is requested here by the Board was strictly enforced the result would be punitive in its nature.

In *Republic Steel Corp. v. Labor Board* (1940), 311 U.S. 7, 11, the Court held that the Board was authorized to issue any kind of an order so long as it operates essentially and primarily to effectuate the policies of the Act, and not *as a retribution or a penalty;* that any affirmative action is to achieve the *remedial* objects which the Act sets forth.

CONCLUSION.

In conclusion the Respondent Union respectfully submits, that respondent Reed's interstate operations had only a *de minimis* effect upon commerce and the Board therefore should not have asserted jurisdiction of the instant case. Further the Board's action in retroactively applying its new "jurisdictional yardsticks" plan or policy, in the instant case to conduct occurring prior to the establishment of the said plan or policy is arbitrary, capricious and an abuse of its discretion; enforcement of the Board's order, therefore, should be denied.

In any event the action of the Respondent Union under the facts herein, did not *encourage* or *discourage* the charging party's membership in the Union; the findings of the Board in that regard are invalid, as is any order of the Board requiring back pay from

the date of the alleged discharge to the date of an offer to said employee of reinstatement to his position, which order in its effect disregards the right to mitigation of damages, where such mitigation can be shown.

Dated, San Francisco, California,
November 24, 1952.

Respectfully submitted,
WATSON A. GARONI,
Attorney for Respondent,
International Hodcarriers, Building & Common Laborers Union, Local No. 36, A.F.L.

No. 13313

United States
Court of Appeals
for the Ninth Circuit.

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., Co-partners, Doing Business as Anderson & Son Transportation Co.,

Appellants,

vs.

A. E. OWENS, FERN OWENS, and R. F. OWENS, Co-partners, Doing Business as Owens Brothers,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Territory of Alaska
Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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In the District Court for the Territory of Alaska,
Third Judicial Division

No. A-5226

A. E. OWENS, FERN OWENS and R. F. OWENS, Co-Partners, Doing Business as OWENS BROTHERS,

Plaintiffs,

vs.

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., Co-Partners, Doing Business as ANDERSON & SON TRANSPORTATION CO.,

Defendants.

COMPLAINT FOR DAMAGES

Comes now the plaintiffs above named and for cause of action against defendants allege as follows:

I.

That at all times herein mentioned, plaintiffs, A. E. Owens, Fern Owens and R. F. Owens, were and now are co-partners, doing business as Owens Brothers, at Ketchikan and Hood Bay, Alaska, and during all of said times were engaged in the business of producing, logging and transporting of lumber.

II.

That at all times herein mentioned, defendants Jack C. Anderson, Sr., and Jack C. Anderson, Jr., were and now are co-partners, doing business as

Anderson & Son Transportation Co., at Seldovia, Alaska, and elsewhere.

III.

That said defendants knowing of the business in which the plaintiffs were and are engaged, and knowing that plaintiffs were desirous of purchasing one TP 100 Army Tug and Passenger Boat to be used in said business, sold and delivered to the plaintiffs on or about the 1st day of April, 1947, said TP 100 Army Tug and Passenger Boat to be used in their said business to the knowledge of the defendants, and the defendants then and there warranted the same to be in all respects fit and proper for such use, and the plaintiffs paid to defendants therefor the sum of $25,000.00 in the manner following:

Five thousand dollars ($5,000.00) paid by plaintiffs to defendants at said time and the balance of twenty thousand dollars ($20,000.00) secured by promissory note bearing interest at 8% per annum, payable at the rate of two thousand dollars ($2,000.00) per month, plus interest on the unpaid balances at the rate of 8% per annum; and, further, said promissory note to be further secured by a mortgage of said vessel.

IV.

That plaintiffs relied upon said warranty and attempted to make use of said vessel for the purpose aforesaid, but that when examination was made of said vessel, including its hull, it was ascertained that the same was not fit for or in a sea-

worthy condition to perform or engage in the purpose for which the same was purchased by plaintiffs.

V.

That as soon as said unfitness was ascertained, plaintiffs notified defendants thereof and of the estimated damages resulting therefrom, consisting of repair to scarred crank pin; it was determined that the main bearings were melted, that the shaft had been run on bare metal, scarring and badly twisting the shaft and necessitating the installation of a new shaft, and that the forefoot of said vessel had been extensively damaged, requiring complete replacement, and further that the forefoot had been driven back into the keel of said vessel, and by reason of the same the hull was in a leaking condition. From the time of the acquisition of the said vessel until August 5, 1947, when the said vessel was fit for the use intended, a period of approximately 105 days, plaintiffs were deprived of such use (allowance of 30 days for ordinary repairs, leaving 75 days actual loss of use). That during said period plaintiffs produced at their lumber camp in Alaska approximately seven million board feet of logs for which plaintiffs paid the sum of $4.00 per thousand for towing the same from Ernest Sound to Sitka, Alaska. And that had plaintiffs had the use of said vessel during said period, at least five and one-half million board feet of said logs would have been towed by said vessel from Ernest Sound to Sitka, Alaska. That by reason of plaintiffs being deprived of the use of said

vessel during said period of time for towing of said logs, plaintiffs would have received a gross profit of approximately $22,000 and a net profit of approximately $11,000.

VI.

That plaintiffs incurred further expenses in the sum of $934.00 in making trips from Alaska to Seattle and return which were necessitated in order to counsel with the shipyard where the repairs to said vessel were being made and carried on, and the machinists who were making said repairs, all of which would have been unnecessary had the said vessel been in condition as represented.

VII.

That the net costs to plaintiffs of repairs to said vessel in addition to the profit of $11,000 which would have been made had said vessel been in condition to perform the services for which purchased, amount to $21,239.32.

That at the time of the sale aforesaid, defendants represented and warranted to plaintiffs that the said vessel so sold was in sound and seaworthy condition with the exception of one scarred crank pin and bruised forefoot, for which an allowance of $5,000.00 was made by defendants to plaintiffs on the purchase price of $30,000.00. That in truth and in fact said vessel was unseaworthy and unsound and of these facts plaintiffs were ignorant of the falsity of such representations and warranties by defendants and said plaintiffs relied on such

representations and warranties in the purchase of said vessel.

VIII.

That at the time of said sale of said vessel by defendants to plaintiffs, defendants well knew that said vessel was not seaworthy and sound for the purpose and business in which plaintiffs were engaged, and by such misrepresentations defendants had induced plaintiffs to purchase said vessel and plaintiffs were misled and injured thereby and have sustained damages by reason of the premises to the amount of $32,239.32.

IX.

That the defendants borrowed a lifeboat from the said TP 100 Army Tug, which said lifeboat, although agreed by defendants to be returned, has not been so returned to said tug or to plaintiffs, and plaintiffs have suffered damage in the value thereof, which was, and is, the sum of one thousand dollars ($1,000.00).

X.

That plaintiffs have been deprived of the use of said TP 100 Army Tug during the period of repairs thereto for a period of seventy-five (75) days, and that the sum of one hundred dollars ($100.00) per day is a reasonable sum to be allowed plaintiffs for the loss of use of said vessel.

XI.

That the sum of seventy-five hundred dollars ($7,500.00) is a reasonable amount to be allowed

plaintiffs as attorneys' fees for the prosecution of this action.

Wherefore, plaintiffs pray judgment against defendants, and each of them,

1. For the sum of $40,739.32 damages;

2. Attorneys' fees in the sum of $7,500.00;

3. Costs of Court, and

4. Such further relief as to the Court shall seem meet and just in the premises.

/s/ JOHN E. MANDERS,
Attorney for Plaintiffs.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 19, 1948.

[Title of District Court and Cause.]

ANSWER

Come now Jack C. Anderson, Sr., and Jack C. Anderson, Jr., co-partners, doing business as Anderson & Son Transportation Company, the above-named defendants, and by way of answer to the plaintiffs' complaint, admit, deny and allege as follows:

I.

Defendants have no knowledge or information sufficient to form a belief concerning the allegations of the first paragraph of plaintiffs' complaint and

for that reason deny each and all of such allegations.

II.

Defendants admit the allegations of the second paragraph of plaintiffs' complaint.

III.

Defendants admit that on or about the first day of April, 1947, they sold to the plaintiff the tug described in the third paragraph of plaintiffs' complaint, at the price therein set forth, and that the balance of the purchase price was to be secured by a mortgage of the vessel, and deny each and all the other allegations of the third paragraph of the plaintiffs' complaint.

IV.

In answer to the fourth paragraph of plaintiffs' complaint, defendants allege that they made no warranty concerning the conditions of the vessel or of its fitness for any job contemplated by the plaintiffs, and allege that such vessel was sold strictly on an "as is" basis, and that they had no knowledge concerning plaintiffs' contemplated use for the vessel. Defendants further allege that in negotiating the sale of the vessel and at the request of plaintiffs, the price of the vessel was reduced below the sale price originally quoted by the defendants by reason of the fact that on an inspection by the plaintiffs, the scarred crank pin and the damaged forefoot were discovered by the parties, and defendants alleged that the vessel was purchased by the plaintiffs after an inspection of the

vessel, and with full knowledge on the part of the plaintiffs as to the condition of the vessel and its fitness for their operations.

V.

Defendants admit that the vessel above described, when sold to plaintiffs, had a scarred crank pin and that the forefoot had been damaged, and allege that plaintiffs had full knowledge of such defects at the time of purchasing the vessel and that plaintiffs purchased the vessel at a reduced price because of such defects. Defendants deny each and all the other allegations of the fifth paragraph of plaintiffs' complaint, except the allegations concerning amount and extent of repairs, and alleged loss of use and alleged loss of profit, and as to those allegations defendants have no knowledge or information sufficient to form a belief thereon, and therefore deny the same.

VI.

Defendants have no knowledge or information concerning the allegations of the sixth paragraph of plaintiffs' complaint, and therefore deny each and all of such allegations, save the allegation of misrepresentation, by defendants, which is denied In that connection, defendants allege that if the plaintiffs incurred the expense set forth in such paragraph, that such expense was not incurred because of any action or representation or misrepresentation, of the defendants.

VII.

Defendants have no knowledge or information concerning the allegations of the seventh paragraph of plaintiffs' complaint having to do with the cost of repairs and alleged damages, and therefore deny each and all of such allegations. Defendants admit that an allowance of five thousand dollars ($5,000.00) was made to plaintiffs by defendants on the purchase price of the vessel by reason of the defects noted in plaintiffs' complaint. Defendants deny all the other allegations of the seventh paragraph of plaintiffs' complaint.

VIII.

Defendants deny each and all the allegations of the eighth paragraph of plaintiffs' complaint, and allege they made no representations to plaintiffs as to the condition of the vessel or its fitness for the work contemplated by the plaintiffs. Defendants further allege that plaintiffs had a full opportunity to inspect the vessel before purchasing the same, that plaintiffs did inspect the vessel before purchasing the same, and allege that if plaintiffs were damaged, such damage is not imputable to the defendants.

IX.

Defendants deny each and all the allegations of the ninth paragraph of plaintiffs' complaint.

In answer to the allegations of paragraph IX of plaintiffs' complaint, defendant admits that he borrowed a lifeboat from plaintiffs, which was to be returned to the Olsen and Wing Shipyards in

Seattle, Washington, and the defendant further advises that said lifeboat was returned in accordance with the agreement.

X.

Defendants have no knowledge or information concerning the allegations of the tenth paragraph of plaintiffs' complaint and for that reason deny each and all of such allegations and in that connection allege that if in fact the plaintiffs were denied the use of the vessel described in plaintiffs' complaint for a period of seventy-five (75) days or for any other period, such loss of use was not the result of any action by the defendants.

XI.

Defendants deny each and all the allegations of the 11th paragraph of plaintiffs' complaint.

Wherefore, having fully answered plaintiffs' complaint, defendants pray that plaintiffs take nothing thereby, and that defendants have and recover of and from the plaintiffs defendants' costs and disbursements in this action incurred, including a reasonable attorney's fee to be set by the Court.

DAVIS & RENFREW,
Attorneys for the Defendants.

By /s/ WILLIAM W. RENFREW.

United States of America,
Territory of Alaska,
Third Judicial Division—ss.

William W. Renfrew, being first duly sworn, upon his oath deposes and says: I am one of the attorneys for the defendants named in the above-entitled action; I make this affidavit of verification on behalf of such defendants for the reason that neither of the parties defendant are now at Anchorage, Alaska, the place where such verification is being made; I have read the foregoing Answer, know the contents thereof, and the matters and things therein contained are true as I verily believe.

/s/ WILLIAM W. RENFREW.

Subscribed and sworn to before me this 10th day of February, 1949.

[Seal] /s/ MILDRED MORIARITY,
Notary Public for Alaska.

My Commission expires 12/20/50.

Service of Copy acknowledged.

[Endorsed]: Filed February 11, 1949.

[Title of District Court and Cause.]

NOTICE

Notice Is Hereby Given, in accordance with the provisions of Rule 31 of the Rules of Civil Pro-

cedure for the District Courts of the United States, that the deposition of Howard A. Dent, now of Route 1, Box 316, Scottsdale, Arizona, will be taken as a witness for the plaintiffs in the above-entitled action, by means of written interrogatories before Ralph A. Phillips, a Notary Public in and for the State of Arizona, whose address is Phoenix National Bank Building, Phoenix, Arizona.

Attached hereto is a true and correct copy of the direct interrogatories propounded by the plaintiffs.

Dated at Anchorage, Alaska, this 27th day of January, 1951.

FAULKNER, BANFIELD & BOOCHEVER.

By R. BOOCHEVER.

/s/ JOHN E. MANDERS,
Attorneys for Plaintiffs.

(Copy)

[Endorsed]: Filed Feb. 10, 1951.

[Title of District Court and Cause.]

DIRECT INTERROGATORIES PROPOUNDED TO HOWARD A. DENT

1. What is your name?
2. What is your occupation?
3. Do you know A. E. Owens?
4. During the spring of 1947, did you meet Jack C. Anderson, Sr., of the firm of Anderson & Son Transportation Co. of Seldovia, Alaska?

5. During the spring of 1947, were you present at a conversation between A. E. Owens and Jack C. Anderson, Sr.?

6. If so, where did such conversation take place?

7. If your answer to Question 5 is in the affirmative, to the best of your recollection, what was said at that conversation?

Dated at Anchorage, Alaska, this 27th day of January, 1951.

FAULKNER, BANFIELD & BOOCHEVER.

By R. BOOCHEVER.

/s/ JOHN E. MANDERS,
Attorneys for Plaintiff.

(Copy)

[Endorsed]: Filed Feb. 10, 1951.

[Title of District Court and Cause.]

ANSWERS TO DIRECT INTERROGATORIES PROPOUNDED TO HOWARD A. DENT

Pursuant to Notice of taking deposition, dated at Anchorage, Alaska, the 27th day of January, 1951, in accordance with Rules 30 and 31 of the Rules of Civil Procedure for the District Courts of the United States which are in effect in the Territory of Alaska, personally appeared before me the undersigned Notary Public in and for the County of Maricopa, State of Arizona, Howard A. Dent, a

witness for plaintiffs in the within action, who, being first duly sworn to testify the truth and nothing but the truth, was examined as follows and made answers as follows to the Interrogatories hereto attached:

To First Interrogatory, the witness answered: My name is Howard A. Dent.

To Second Interrogatory, the witness answered: Lumberman and transportation.

To Third Interrogatory, the witness answered: Yes.

To Fourth Interrogatory, the witness answered: Yes.

To Fifth Interrogatory, the witness answered: Yes.

To Sixth Interrogatory, the witness answered: Mr. Owens came to my office and asked me to look at this boat of Anderson's, which was near Ballard, that he anticipated buying with the idea of having me help him finance it. I went out in the afternoon and met Mr. Anderson on the boat, at which time we went over the boat quite thoroughly.

To Seventh Interrogatory, the witness answered: The conversation took place on the boat mentioned and as they were interested in disposing of the boat and Owens needed it for his logging business he was endeavoring to buy the boat, and in going over it he was advised that it

had just returned from Alaska and was in good shape except that they had hit a log or rock and that it might need some minor repairs there and while the engine did not run Anderson advised us that with the exception of one bearing the engine was in first class shape and that for the sum of not to exceed $5,000.00 the boat could be put in first class condition.

/s/ HOWARD A. DENT.

Subscribed and sworn to before me this 17th day of February, 1951.

/s/ RALPH A. PHILLIPS,
Notary Public.

My Commission expires June 23, 1951.

State of Arizona,
County of Maricopa—ss.

I, the undersigned, under and by virtue of the Notice of taking deposition hereto attached and in accordance with Rules 30 and 31 of the Rules of Civil Procedure of the District Courts of the United States which are in effect in the Territory of Alaska, do hereby certify that Howard A. Dent, named in said Notice as a witness and whose signature is attached to the foregoing deposition, appeared before me in the County of Maricopa, State of Arizona, on the 17th day of February, 1951, and after being first duly sworn by me and put under oath according to law, made answer to each and every and all of the attached interroga-

tories as hereinabove set forth, and that said answers hereinabove set forth are the answers of said witness to said interrogatories personally reduced to writing by me and carefully read over by me to said witness, who thereupon affixed his signature thereto; that I did personally record the testimony of said witness.

That the foregoing deposition is a true record of the testimony given by the witness.

That I am an officer authorized to administer oath by and under the laws of the State of Arizona; that I am not a relative or employee or attorney or counsel for either party to the within action, and am not a relative or employee of such attorney or counsel, and am not financially interested in the within action.

That said witness subscribed his name and swore to the same before me as such Notary Public.

Given under my official signature and seal this 17th day of February, 1951.

[Seal] /s/ RALPH A. PHILLIPS,
Notary Public.

My Commission expires June 23, 1951.

[Admitted in evidence as Plaintiffs' Exhibit No. 22.]

[Endorsed]: Filed February 10, 1951.

[Title of District Court and Cause.]

JOURNAL ENTRIES

Trial by Court—March 8, 1951

Now at this time cause No. A-5226, entitled A. E., Fern and R. F. Owens, d/b/a Owens Brothers, Plaintiffs, versus Jack C. Anderson, Sr., and Jack C. Anderson, Jr., d/b/a Anderson and Son Transporation Co., Defendants, came on regularly for trial. Plaintiff, A. E. Owens, being present and with Robert Boochever and John E. Manders of his counsel. The Defendant, Jack C. Anderson, Sr., being present and with William W. Renfrew of his counsel. The following proceedings were had, to wit:

Opening statement to the Court was had by Robert Boochever, for and in behalf of the plaintiffs.

Opening statement to the Court was waived by William Renfrew, for and in behalf of the defendants.

Almon E. Owens, being first duly sworn, testified for and in behalf of the plaintiffs.

An agreement, dated 4/1/47, between Jack C. Anderson, Sr., Jack C. Anderson, Jr., and A. E. Owens, Fern Owens and R. F. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 1.

A check, dated 5/8/47, in the sum of $300.00, payable to Wilson Machine Works, signed by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 2.

An invoice, No. 78010, by Fairbanks, Morse and Co., dated 6/17/47, to Owens Brothers, was duly offered, marked and admitted as Plaintiffs' Exhibit 3.

An invoice, No. 79975, by Fairbanks, Morse and Co., to Owens Bros., dated 7/3/47, sum of $375.00, was duly offered, marked and admitted as Plaintiffs' Exhibit 4.

A check, dated 7/22/47, in the sum of $6056.66, payable to Fairbanks, Morse and Co., was signed by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 5.

Two invoices, Nos. 76321 and 83043, by Fairbanks, Morse and Co., to Owens Brothers, in sum of $1778.94, with itemized statement of materials attached, was duly offered, marked and admitted as Plaintiffs' Exhibit 6.

Photograph of subject vessel on ways was duly offered, marked and admitted as Plaintiffs' Exhibit 7.

Photograph of subject vessel on ways duly offered, marked and admitted as Plaintiffs' Exhibit 8.

Invoice No. 2280, to Owens Bros. Logging Co., sum of $1,068.20, by Diesel Engineering Co., was duly offered, marked and admitted as Plaintiffs' Exhibit 9.

Invoice No. 2281, to Owens Bros. Logging Co., sum of $153.84, by Diesel Engineering Co., was duly offered, marked and admitted as Plaintiffs' Exhibit 10.

Check dated 6/12/47, $1,222.04, payable to Diesel

Engineering Co., by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 11.

Check dated 6/12/47, sum of $632.42, payable to Canal Electric Co., by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 12.

Three checks, dated 7/22/47, sum of $2,390.03; 6/3/47, sum of $3,000.00; 7/11/47, sum of $3,000.00, to Pacific Electrical and Mechanical Co., Inc., by A. E. Owens, with attached itemized repair material, was duly offered, marked and admitted as Plaintiffs' Exhibit 13.

Two checks, dated 7/8/47, sum of $232.57, and 7/31/47, sum of $222.45, both payable to H. B. Moore and signed by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 14.

Three checks, dated 7/8/47, sum of $292.90; 6/5/47, sum of $292.90; 7/31/47, sum of $289.50, all payable to C. R. Tucker, and signed by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 15.

Two checks, dated 7/8/47, sum of $219.26; 7/31/47, sum of $245.20, both payable to W. E. Eaton, and signed by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 16.

Two checks, dated 7/8/47, sum of $92.45; 7/30/47, sum of $172.50, both payable to R. F. Jacobson, and signed by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 17.

Six checks, all payable to Mel Blanchard and

signed by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 18.

(At 11:45 o'clock a.m., Court duly continued cause until 2:00 o'clock p.m.)

Now came the respective parties, came also the respective counsel as heretofore, and the trial of cause No. A-5226, entitled A. E., Fern and R. F. Owens, d/b/a Owens Brothers, Plaintiffs, versus Jack C. Anderson, Sr., and Jack C. Anderson, Jr., d/b/a Anderson and Son Transportation Co., Defendants, was resumed.

Almon E. Owens, heretofore duly sworn, resumed witness stand for further testimony for and in behalf of the plaintiffs.

Check, dated 3/21/48, sum of $1,678.02, payable to Mel Blanchard, and signed by A. E. Owens, was duly offered, marked and admitted as Plaintiffs' Exhibit 19 for identification only.

Letter, dated 6/11/47, to Mr. A. E. Owens, by Jack C. Anderson, was duly offered, marked and admitted as Plaintiffs' Exhibit 20.

Two pages, dated 2/11/47, in the log book for the M/S Helena, was duly offered, marked and admitted as Plaintiffs' Exhibit 21.

An application of owner for official number, U. S. Customs form 1320, signed by A. E. Owens, was duly offered, marked and admitted as Defendants' Exhibit A.

(At 3:15 o'clock p.m., Court duly continued cause until 3:25 o'clock p.m.)

Now came the respective parties, came also the respective counsel as heretofore, and the trial of cause No. A-5226, entitled A. E., Fern and R. F. Owens, d/b/a Owens Brothers, Plaintiffs, versus Jack C. Anderson, Sr., and Jack C. Anderson, Jr., d/b/a Anderson and Son Transportation Co., Defendants, was resumed.

Almon E. Owens, heretofore duly sworn, resumed witness stand for further cross-examination for and in behalf of the defendants.

(At 4:45 o'clock a.m., Court duly continued cause until 10:00 o'clock a.m. of Friday, March 9, 1951.)

Trial by Court—March 9, 1951

Now came the respective parties, came also the respective counsel as heretofore, and the trial in cause No. A-5226, entitled A. E., Fern and R. F. Owens, d/b/a Owens Brothers, Plaintiffs, versus Jack C. Anderson, Sr., and Jack C. Anderson, Jr., d/b/a Anderson and Son Transportation Co., Defendants, was resumed.

Mel Blanchard, being first duly sworn, testified for and in behalf of the plaintiffs.

Deposition of Howard A. Dent, for and in behalf of the plaintiffs, was duly offered, marked and admitted as Plaintiffs' Exhibit 22, and said deposition remained in Court file of this cause.

(Plaintiffs rest.)

At this time William W. Renfrew, for and in behalf of the defendants, moved Court for judg-

ment for defendants on grounds of the testimony of plaintiff A. E. Owens.

Argument to the Court was had by William W. Renfrew, for and in behalf of the defendants.

Argument to the Court was had by Robert Boochever, for and in behalf of the plaintiffs.

Whereupon the Court, having heard the arguments of the respective counsel, and being fully and duly advised in the premises, reserved decision.

George H. Saindon, being first duly sworn, testified for and in behalf of the defendants.

(At 11:45 o'clock a.m., Court duly continued cause until 2:00 o'clock p.m.)

Now came the respective parties, came also the respective counsel as heretofore, and the trial in cause No. A-5226, entitled A. E., Fern and R. F. Owens, d/b/a Owens Brothers, Plaintiffs, versus Jack C. Anderson, Sr., and Jack C. Anderson, Jr., d/b/a Anderson and Son Transportation Co., Defendants, was resumed.

George H. Saindon, heretofore duly sworn, resumed witness stand for further testimony for and in behalf of the defendants.

Almon E. Owens, heretofore duly sworn, resumed witness stand for further testimony for and in behalf of the defendants.

Gerald M. Oaksmith, being first duly sworn, testified for and in behalf of the defendants.

(At 3:30 o'clock p.m., Court duly continued cause until 3:40 o'clock p.m.)

Now came the respective parties, came also the respective counsel as heretofore, and the trial in cause No. A-5226, entitled A. E., Fern and R. F. Owens, d/b/a Owens Brothers, Plaintiffs, versus Jack C. Anderson, Sr., and Jack C. Anderson, Jr., d/b/a Anderson and Son Transportation Co., Defendants, was resumed.

Gerald M. Oaksmith, heretofore duly sworn, resumed witness stand for further testimony for and in behalf of the defendants.

Jack C. Anderson, being first duly sworn, testified for and in behalf of the plaintiffs.

(At 5:00 o'clock p.m., Court duly continued cause until 10:00 o'clock a.m. of Saturday, March 10, 1951.)

Entered Mar. 9, 1951.

Trial by Court—March 10, 1951

Now came the respective parties, came also the respective counsel as heretofore, and the trial in cause No. A-5226, entitled A. E., Fern and R. F. Owens, d/b/a Owens Brothers, Plaintiffs, versus Jack C. Anderson, Sr., and Jack C. Anderson, Jr., d/b/a Anderson and Son Transportation Co., Defendants, was resumed.

Jack C. Anderson, heretofore sworn, resumed witness stand for further cross-examination for and in behalf of the plaintiffs.

Letter, dated 5/17/47, to Mr. Jack C. Anderson, Jr., by Orville H. Mills, was duly offered, marked and admitted as Defendants' Exhibit B.

Letter, 7/24/47, to Mr. Jack C. Anderson, by

Orville H. Mills, was duly offered, marked and admitted as Defendants' Exhibit C.

Jack C. Anderson, Jr., being first duly sworn, testified for and in behalf of the defendants.

Mel Blanchard, heretofore duly sworn, resumed witness stand for further testimony for and in behalf of the plaintiff.

Almon E. Owens, heretofore duly sworn, resumed witness stand for further testimony for and in behalf of the plaintiffs.

At this time, upon stipulation by and between respective counsel, it is agreed that in the event that William W. Renfrew, of counsel for defendants, desired a reporter's transcript of certain testimony, the cause was continued until the reporter can provide said transcript; and the cause was further continued for 10 days for the filing of depositions, and counsel are given 30 days thereafter for the filing of briefs.

Entered March 10, 1951.

Scottsdale, Arizona,
Mar. 12, 1949.

Mr. Orvill H. Mills,
Central Bldg.,
Seattle, Wash.

Dear Sir:

I am just in receipt of a letter from A. E. Owens, Hood Bay, Alaska, regarding the purchase of their tug from Jack Anderson.

Inasmuch as I expected to help A. E. Owens finance the boat, I went out to look it over with him, "but could not fix the date," at which time Anderson told us the boat did not leak, and the only work necessary on the engine was to smooth up one connecting rod bearing. And the hull only needed a small repair to the bow where they had hit a log on the way down. They stated that an expenditure of not to exceed $5000.00 would put the boat in first class condition. It seems to me I remember there was a bent rudder post also, but they said the $5000.00 would completely overhaul the boat, putting it in first class condition.

A. E. has advised me that you are familiar with the transaction, and that a deposition from me might help him in settling with them.

For this reason I am asking that you prepare a deposition and mail it to me here, where I can sign it before an Arizona Notary and air mail it to Alaska, where I hope it would reach them in time and be of assistance to them.

If you will air mail it to me I will no doubt get it in a couple of days.

Awaiting your reply, I remain,

Yours truly,

H. A. DENT,
Route 1, Box 316,
Scottsdale, Arizona.

[Title of District Court and Cause.]

NOTICE

Notice Is Hereby Given, in accordance with the provisions of Rule 31 of the Rules of Civil Procedure for the District Courts of the United States, that the deposition of Howard A. Dent, now of Route 1, Box 316, Scottsdale, Arizona, will be taken as a witness for the plaintiffs in the above-entitled action, by means of written interrogatories before Ralph A. Phillips, a Notary Public in and for the State of Arizona, whose address is Phoenix National Bank Building, Phoenix, Arizona.

Attached hereto is a true and correct copy of the direct interrogatories propounded by the plaintiffs.

Dated at Juneau, Alaska, this 28th day of March, 1951.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Plaintiffs.

I do hereby certify that I mailed a true and correct copy of the foregoing notice and attached Direct Interrogatories to William W. Renfrew, attorney for the defendants, via prepaid air mail on March 29, 1951.

/s/ R. BOOCHEVER,
Of Plaintiffs' Attorneys.

[Endorsed]: Filed April 2, 1951.

[Title of District Court and Cause.]

DIRECT INTERROGATORIES PROPOUNDED TO HOWARD A. DENT

1. Are you the same Howard A. Dent who has previously answered interrogatories in the above-entitled action?

2. In your previous answer to the seventh interrogatory propounded to you, you stated:

> "The conversation took place on the boat mentioned and as they were interested in disposing of the boat and Owens needed it for his logging business he was endeavoring to buy the boat and in going over it he was advised that it had just returned from Alaska and was in good shape except that they had hit a log or rock and that it might need some minor repairs there and while the engine did not run Anderson advised us that with the exception of one bearing the engine was in first class shape and that for the sum of not to exceed $5,000.00 the boat could be put in first class condition."

Do you have any means of refreshing your memory as to just what was said by Mr. Anderson to Mr. Owens at that time in regard to the object which he stated they had hit?

3. On March 12, 1949, did you write a letter to Mr. Orville H. Mills, relating your recollection of this conversation at that time? If you have a copy of that letter which is a true and correct copy of the original letter mailed by you to Mr. Mills on

or about March 12, 1949, attach such copy to your answers to these interrogatories.

4. Do you now know what was said by Mr. Anderson in regard to the object that had been hit?

5. If your answer to the last question is in the affirmative, what was said?

6. Was anything else, other than the matters contained in your answer to the seventh interrogatory previously propounded to you, said by Mr. Anderson to Mr. Owens in regard to the condition of the vessel?

7. In the answer to the seventh interrogatory mentioned above, you stated that "the engine did not run." What did you mean by that statement?

Dated at Juneau, Alaska, this 28th day of March, 1951.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Plaintiffs.

[Title of District Court and Cause.]

ANSWERS TO DIRECT INTERROGATORIES PROPOUNDED TO HOWARD A. DENT

Pursuant to the stipulation dated March 28, 1951, for the taking of the deposition of Howard A. Dent in accordance with Rules 30 and 31 of the Rules of Civil Procedure for the District Courts of the

United States which are in effect in the Territory of Alaska, personally appeared before me, the undersigned Notary Public in and for the County of Maricopa, State of Arizona, Howard A. Dent, a witness for plaintiffs in the within action, who, being first duly sworn to testify the truth and nothing but the truth was examined as follows and made answers as follows to the Interrogatories hereto attached:

To First Interrogatory the witness answered: I am.

To Second Interrogatory the witness answered: Yes, I have means of refreshing my memory.

To Third Interrogatory the witness answered: I wrote such letter on March 12, 1949, to Mr. Orvill H. Mills and am attaching a copy of the letter written at that time which is a true and correct copy of the original.

To Fourth Interrogatory the witness answered: Yes. After refreshing my memory I know now what was said by Mr. Anderson in regard to the object that had been hit.

To Fifth Interrogatory the witness answered: Mr. Anderson stated that the object struck was a log.

To Sixth Interrogatory the witness answered: Yes, Mr. Anderson made a representation in regard to the engine.

To Seventh Interrogatory the witness answered: He stated that the engine had just returned

from Alaska under its own power and that outside of the connecting rod bearing which had to be smoothed up the engine was in first-class condition. In my previous deposition wherein I stated the engine did not run I merely meant that it was not operated, started up, while demonstrating it to us but, as above stated, had just come from Alaska under its own power according to Mr. Anderson.

/s/ HOWARD A. DENT.

Subscribed and sworn to before me this 10th day of May, 1951.

[Seal] /s/ RALPH A. PHILLIPS,
Notary Public.

My commission expires June 23, 1951.

State of Arizona,
County of Maricopa—ss.

I, the undersigned, under and by virtue of the stipulation dated March 28, 1951, for the taking of the deposition of Howard A. Dent and in accordance with Rules 30 and 31 of the Rules of Civil Procedure of the District Courts of the United States which are in effect in the Territory of Alaska, do hereby certify that Howard A. Dent, named in said stipulation as a witness and whose signature is attached to the foregoing deposition, appeared before me in the County of Maricopa, State of Arizona, on the 10th day of May, 1951, and after being first duly sworn by me and put

under oath according to law made answer to each and every and all of the attached interrogatories as hereinabove set forth and that said answers hereinabove set forth are the answers of said witness to said interrogatories personally reduced to writing by me and carefully read over by me to said witness who thereupon affixed his signature thereto; that I did personally record the testimony of said witness.

That the foregoing deposition is a true record of the testimony given by the witness.

That I am an officer authorized to administer oath by and under the laws of the State of Arizona; that I am not a relative or employee or attorney or counsel for either party to the within action and am not a relative or employee of such attorney or counsel and am not financially interested in the within action.

That said witness subscribed his name and swore to the same before me as such Notary Public.

Given under my official signature and seal this 10th day of May, 1951.

[Seal] /s/ RALPH A. PHILLIPS,
Notary Public.

My commission expires June 23, 1951.

[Endorsed]: Filed March 15, 1951.

[Title of District Court and Cause.]

OPINION

Plaintiffs seek to recover $34,487.97 in damages for breach of warranty as to the condition of a tug sold to the plaintiffs.

In 1946, at Seward, Alaska, the Army sold the tug involved in this controversy as surplus to the defendants, who used it in their transportation business. In February, 1947, the tug was taken to Seattle for repairs. En route she struck a rock and was anchored in a nearby harbor for the night so that the extent of the damage might be determined. After her arrival in Seattle, the defendants decided to sell the tug rather than have it repaired. At this juncture the plaintiff A. E. Owens appeared on the scene. His firm was in the market for a tug to be used in connection with its logging business in Alaska. The defendant J. C. Anderson showed him the tug and Owens made a casual inspection. Owens told Anderson that he was engaged in the logging business in Alaska and desired a tug for towing logs. Anderson replied that the tug was in fair condition with the exception that the crankshaft pin for No. 5 cylinder was scored and that the forefoot or the stem was damaged from striking a log on the trip to Seattle, but that the vessel did not leak. Anderson further told Owens that the tug could be put in first class shape for $5,000 and offered to sell it for $25,000 in its then condition, or for $30,000 repaired. Owens elected to make his own repairs and agreed to buy

the tug for $25,000. The agreement was executed on April 1st, but the agreement not only does not even refer to the condition of the tug, but its purpose apparently was to provide for immediate transfer of possession pending receipt of a bill of sale from the Army, which was a prerequisite to documentation.

From the testimony it appears that although Owens has been engaged in the logging business for many years, during the course of which he has bought and operated boats, his knowledge of vessels was limited to what would ordinarily be acquired in traveling on them to and from his logging camps, and his inspection revealed no more than what was open and visible as the tug lay in the water. One piston had been removed from the cylinder and was made fast to the motor block. This was done because of overheating due to the scored crank pin. Thereafter the engine was operated on 5 of its 6 cylinders. An inspection of the engine by the witness Engstrom, the mechanical expert of the Fairbank-Morse Company, presumably the manufacturer of the engine, disclosed that all the main bearings were ruined and the main bearing journals scored and ⅛ inch over the original shaft diameter; that the drive gear was useless because of several broken teeth; that the water pump was completely obstructed; that the salt and fresh water pump shafts were bent and the bearings ruined; that the crank shaft was warped from excessive heat and no longer useful; that the oil columns were clogged with babbitt from the

bearings and totally obstructed and that a makeshift oil line had been installed to provide lubrication. The base of the engine was also warped from excessive heat. Engstrom testified that the warping of the base of the engine and the crankshaft was caused by heat of such intensity as could be generated only by a fire ignited in the base from friction as a consequence of a total lack of lubrication.

The vessel was then placed in a dry dock, where an inspection revealed that the lower part of the stem, the entire forefoot, the forward end of the keel and the ends of the adjacent planks were almost completely splintered, that the stem plate hung by one end and that the forward watertight compartment was filled with water. It was also discovered that the tail shaft was oxidized from galvanic action or electrolysis to such an extent as to require replacement; that the battery required new plates; that the stuffing box was beyond repair and that the winches were frozen in consequence of rust and lack of lubrication.

It was proved that instead of striking a log, which would have caused relatively little damage to a tug of this size, the tug had struck a rock, and from the photographs of the bow, plaintiffs' exhibits Nos. 9 and 19, I am convinced that so much damage could not have resulted unless the vessel struck at full speed. The testimony of the defendant Anderson as to this incident was such as to seriously affect his credibility.

The plaintiffs contend that Anderson warranted

that the vessel was tight and in good condition except for a bruised forefoot and a scored crank pin. Notwithstanding that the defendants admit they reported the vessel to be tight and in fair condition except for a scored crank pin and damaged forefoot, they contend that the tug was sold "as is." Not only do the plaintiffs deny this but an examination of the defendants' testimony warrants the conclusion that this contention is an afterthought. Anderson warranted the tug to be in fair condition with the exception noted. Having done so, he could not avoid the effect thereof by replying to Owens' inqury, a few days later, as to his best price, that the price was $25,000 "as is." Under the circumstances, the only meaning that can be given the term "as is," assuming that it was used, is that it meant the condition already stated as fair with the exceptions referred to.

The applicable law is that of the State of Washington, Bulkley v. Honold, 19 Howard 390, which has enacted the Uniform Sales Act, 7 Remington Revised Statutes, Sections 5836-1, et seq., the pertinent sections of which are as follows:

Sec. 12: "Any affirmation of fact or any promise by the seller relating to the goods is an express waranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods, relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

Sec. 15 (1) (3): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

(3) "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

Sec. 69 (1)(a)(b), (6) & (7): (1) "Where there is a breach of warranty by the seller the buyer may at his election (a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution of extinction of the price; (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;"

(6) "The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."

(7) "In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Since the defendant sold the tug for $25,000 and the plaintiffs claim it cost $27,487.97 to restore

the vessel to the condition it was warranted to be in, it would appear either that the defendants sold the tug for far less than its value or that the plaintiffs had it completely overhauled. I am inclined to believe that much of the work was unnecessary to restore the vessel to the condition it was warranted to be in, for it is incredible that the value of a tug which cost $250,000 to build three years before had, because of a ruined motor and damaged bow, wear and tear and perhaps neglect, somehow depreciated to minus $2,500.

I find that the tug was not sold "as is" but upon the express warranty that it was tight and in fair condition with the exceptions noted; and that this warranty was made with the intent that the plaintiffs should rely, and that plaintiffs bought the tug in reliance, thereon. I also find that although Owens examined the vessel, it was not, nor could it have been, such an "examination as ought to have revealed" (Sec. 15 (3) Uniform Sales Act), the internal defects in the motor and the under water damage to the hull.

I further find that to restore the vessel to a fair condition it was reasonably necessary to, and that the plaintiffs did, expend $300 for turning the scored crank pin, $6,056.66 for a new crankshaft, $6,085.19 for labor and material in connection with the installation of the crankshaft and repair of the engine, $8,390.03 for repairs to the bow, $966.80 for supervision by the plaintiffs' representative Blanchard, a total of $21,798.68, from which the $5,000 which plaintiff expected to expend on re-

pairs in accordance with the defendants' estimate, must be deducted, leaving as the amount allowed for repairs the sum of $16,798.68 as against $27,-487.97 expended by the plaintiffs. I am inclined to believe that from the amount allowed for repairs should be deducted the equivalent of accrued depreciation for three years, the age of the tug, but in the absence of any evidence, no finding can be made on this subject.

The plaintiffs also claim $11,000 for loss of profit. This is based on the plaintiffs' estimate that of the total of 105 days consumed in making repairs, 75 days were consumed in restoring the tug to the condition it was warranted to be in. In view of the finding of the Court, it is obvious that the time basis should be in the same proportion to 105 days as $16,798.68 is to $27,487.97, or 63 days. From this must be deducted the 10 days consumed in making the trip to San Francisco to pick up a barge and towing it to Alaska, leaving 53 instead of 75 days for loss of profits, or $7,733.33 instead of $11,000. It should be noted that no proof of charter value for this 10-day period was submitted. I also find that the value of the lifeboat, which defendants borrowed from the plaintiffs' tug and failed to return, was $500.

Otherwise, I find that the vessel was in fair condition as represented and, hence, conclude that the claims for a new tail shaft, stuffing box, battery plates and copper paint should be disallowed. An examination of the bills discloses that the cost of labor was quite uniformly twice the material cost.

I, therefore, find that $240, the cost of applying the copper paint, should be deducted to make four that it was not necessary for Owens to make four trips to Seattle and that the evidence as to what his crew did in assisting in the making of repairs and what his supervisor bought in tools and supplies for use in connection therewith, is insufficient to show that the damages claimed for these items resulted from the breach and, hence, these claims are likewise disallowed.

Accordingly, I conclude that the plaintiffs are entitled to a judgment of $24,788.01 and that $900 should be allowed for attorney fees.

Dated at Ketchikan, Alaska, this 7th day of November, 1951.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed November 14, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having come on for hearing before the Court without a jury on March 8, 9 and 10, 1951, and A. E. Owens of the plaintiffs having appeared in person and the plaintiffs having appeared by R. Boochever of Faulkner, Banfield & Boochever, and John E. Manders of Anchorage,

of their attorneys, and the defendants being present in person and appearing by William Renfrew, of their attorneys, and evidence having been adduced in open Court and the parties having stipulated to the taking of additional depositions and to the submission of written arguments, and the depositions of Orville H. Mills, Ted Engstrom and H. A. Dent having been submitted by the plaintiffs, and the deposition of David Elden Erickson having been submitted by the defendants, and written arguments having been filed, the Court being fully advised, makes the following

Findings of Fact

1. Plaintiffs and defendants were residents of the Territory of Alaska at all times mentioned herein.

2. In February, 1947, the defendants took the vessel TP 100, later known as the tug ADAK, from Alaska to Seattle for repairs.

3. En route from Alaska to Seattle the vessel forcibly struck a rock so that it was necessary for it to be backed off, and the defendants anchored in a nearby harbor to determine the extent of the damage.

4. After arriving in Seattle, the defendants decided to sell the vessel rather than have it repaired.

5. A. E. Owens, representing the plaintiffs, was shown the vessel by the defendant J. C. Anderson, and made a casual inspection of the vessel.

6. A. E. Owens informed the defendants that the plaintiffs were in the logging business in Alaska and desired to purchase a vessel for use in towing logs.

7. J. C. Anderson stated that the vessel was in fair condition with the exception that the crankshaft pin for No. 5 cylinder was scored and that the forefoot or the stem was damaged from striking a log on the trip to Seattle, but that the vessel did not leak. Anderson further stated that the vessel could be put in first class shape for $5,000.

8. The defendants offered to sell the vessel to the plaintiffs for $25,000 in its then condition or for $30,000 repaired.

9. On April 1, 1947, A. E. Owens, on behalf of the plaintiffs, agreed to purchase the vessel for $25,000 and elected to make his own repairs.

10. A written agreement was executed on April 1, 1947, but the agreement did not refer to the condition of the tug.

11. The purpose of the agreement was to provide for immediate transfer of possession of the vessel pending receipt of a bill of sale from the Army, which was a prerequisite to documentation.

12. A. E. Owens had been engaged in the logging business for many years during the course of which he had bought and operated boats.

13. A. E. Owens' knowledge of vessels was limited to what would ordinarily be acquired in traveling on them to and from his logging camps.

14. A. E. Owens' inspection of the vessel TP 100 revealed no more than what was open and visible as the tug lay in the water.

15. The only damage that this inspection revealed was that one piston had been removed from the cylinder and was made fast to the motor block.

16. After purchase of the vessel it was ascertained that all of the main bearings were ruined and the main bearing journals scored and ⅛ inch over the original shaft diameter; that the drive gear was useless because of several broken teeth; that the water pump was completely obstructed; that the salt and fresh water pump shafts were bent and the bearings ruined; that the crankshaft was warped from execessive heat and no longer useful; that the oil columns were clogged with babbitt from the bearings and totally obstructed and that a makeshift oil line had been installed to provide lubrication. The base of the engine was also warped from excessive heat.

17. After its purchase, the vessel was placed in a dry dock where an inspection revealed that the lower part of the stem, the entire forefoot, the forward end of the keel, and the ends of the adjacent planks, were almost completely splintered, that the stem plate hung by one end and that the forward watertight compartment was filled with water.

18. The damage referred to in the paragraph above was below the water line and could not be ascertained by casual inspection of the vessel before it was placed in dry dock.

19. After the purchase of the vessel, it was also discovered that the tail shaft was oxidized from galvanic action or electrolysis to such an extent as to require replacement; that the battery required new plates; that the stuffing box was beyond repair and that the winches were frozen in consequence of rust and lack of lubrication.

20. Striking a log would have caused relatively little damage to a tug of this size.

21. The examination made by A. E. Owens of the vessel was not nor could it have been such an examination as ought to have revealed the internal defects in the motor and the under-water damage to the hull.

22. Plaintiffs expended $300.00 for turning the scored crank pin, $6,056.66 for a new crankshaft, $6,085.19 for labor and material in connection with the installation of the crankshaft and repair of the engine, $8,390.03 for repairs to the bow, and $966.80 for supervision by the plaintiffs' representative Blanchard, making a total of $21,798.68.

23. Additional expenditures were made by the plaintiffs so that the total amount expended was $27,487.97.

24. The sum of $21,798.68 which was expended by the plaintiffs in the repair of the vessel, was necessary to restore the vessel to a fair condition and exceeded the $5,000.00, which plaintiffs expected to expend on repairs in accordance with defendants' estimate, by the sum of $16,798.68.

25. As a result of the repairs necessary to restore the vessel to fair condition, in addition to the repairs which were to have been made in accordance with the defendants' estimate, the plaintiffs were delayed in securing the use of the vessel, for a period of 64 days.

26. The plaintiffs spent ten days in making a trip to San Francisco to pick up a barge and tow it to Alaska, making a net of 54 days loss of use of the vessel.

27. The plaintiffs sustained a loss of profits in the sum of $7,920.18, due to the delay in securing the use of the vessel over and above the time that it would have been necessary to repair the vessel had it been in the condition as represented.

28. The defendants borrowed a lifeboat from the plaintiffs and failed to return the same.

29. The value of the lifeboat so borrowed was $500.00.

30. The cost of applying copper paint to the vessel was $240.00, and should be deducted from the cost of placing the vessel in fair condition.

31. It was unnecessary for A. E. Owens to make four trips to Seattle in connection with the repairs of the vessel.

32. The evidence in regard to the work performed by A. E. Owens' crew, is insufficient to show that it was necessitated by the misrepresentations of the defendants.

33. The evidence in regard to the purchase by Mr. Blanchard of tools and supplies is insufficient to show that these claims resulted from breach of warranties by the defendants.

From the foregoing Finding of Fact, the Court makes the following

Conclusions of Law

1. The defendants made express warranties in regard to the condition of the vessel TP 100.

2. The warranties made by the defendants were such as to induce the plaintiffs and did induce the plaintiffs to purchase the vessel in reliance thereon.

3. The plaintiffs purchased the vessel in reliance on the warranties made by the defendants and it was the intent of the defendants that the plaintiffs should so rely on the warranties.

4. The examination made by A. E. Owens of the vessel was not such an examination as ought to have revealed the internal defects in the motor and the underwater damage to the hull.

5. As a result of the breach of warranties in regard to the condition of the vessel, plaintiffs have been damaged in the sum of $24,478.86.

6. As a result of the wrongful detention of the lifeboat, plaintiffs have been damaged in the sum of $500.00.

7. Plaintiffs are entitled to judgment against the defendants in the sum of $24,978.86, together

with plaintiffs' costs and disbursements herein, including a reasonable attorney's fee of $900.00.

Dated at Juneau, Alaska, this 27th day of November, 1951.

/s/ GEORGE W. FOLTA,
District Judge.

I certify that a true and correct copy of the foregoing Findings of Fact and Conclusions of Law were mailed to William Renfrew of Davis & Renfrew, Attorneys at Law, Anchorage, Alaska, this 24th day of November, 1951, by prepaid air mail.

/s/ R. BOOCHEVER,
Of Plaintiffs' Attorneys.

[Endorsed]: Filed November 30, 1951.

In the District Court for the Territory of Alaska, Division Number Three, at Anchorage

No. A-5226

A. E. OWENS, FERN OWENS, and R. F. OWENS, Co-Partners, Doing Business as OWENS BROTHERS,

Plaintiffs,

vs.

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., Co-Partners, Doing Business as ANDERSON & SON TRANSPORTATION CO.,

Defendants.

JUDGMENT

This matter coming on to be heard before the Court without a jury on March 8, 9, and 10, 1951, and A. E. Owens of the plaintiffs having appeared in person, and the plaintiffs having appeared by R. Boochever, of Faulkner, Banfield & Boochever, and John E. Manders of Anchorage, of their attorneys, and the defendants being present in person and appearing by William Renfrew of their attorneys, and evidence having been adduced in open Court and the parties having stipulated to the taking of additional depositions and to the submission of written arguments, and the depositions of Orville H. Mills, Ted Engstrom and H. A. Dent having been submitted by the plaintiffs, and the deposition of David Elden Erickson having been submitted by the defendants, and written arguments having been

filed, and the Court having made its Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs have judgment against the defendants in the sum of $24,978.86, together with plaintiffs' costs and disbursements, including an attorneys' fee of $900.00.

Dated at Juneau, Alaska, this 27th day of November, 1951.

/s/ GEORGE W. FOLTA,
District Judge.

I certify that a true and correct copy of the foregoing Judgment was mailed to defendants' attorneys at Anchorage, Alaska, via prepaid air mail this 24th day of November, 1951.

/s/ R. BOOCHEVER,
Of Plaintiffs' Attorneys.

[Endorsed]: Filed November 30, 1951.

[Title of District Court and Cause.]

Judgment having been entered in the above-entitled action on the .. day of November, 1951, against the above-named defendants, the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$ 15.00
Fees of the marshal	3.10
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	142.80

Fees and disbursements for printing.....	.....
Fees for witnesses (itemized on reverse side)	532.90
Fees for exemplification and copies of papers necessarily obtained for use in case	.....
Docket fees under 28 U.S.C. 1923	.....
Costs incident to taking of depositions ...	122.50
Costs as shown on Mandate of Court of Appeals—Other Cost (Please itemize)..	.....
Attorneys' fees.....	900.00
Trial fee.....	6.00
Total	$1,722.30

United States of America,
Territory of Alaska—ss.

I, John E. Manders, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day served on Davis & Renfrew attorneys for defendants.

/s/ JOHN E. MANDERS,
One of the Attorneys for
Plaintiffs.

Subscribed and sworn to before me this 1st day of December, A.D. 1951, at Anchorage, Alaska.

[Seal] /s/ WILLIAM H. OLSEN,
Notary Public for Alaska.

My commission expires 11/1/54.

Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)

Name and Residence	Attendance Days	Attendance Total Cost	Subsistence Days	Subsistence Total Cost	Mileage Miles	Mileage Total Cost	Total Cost Each Witness
Melvin Blanchard, Orick, Cal.	3	$12.00	3	$12.00	939	$281.70	$305.70
A. E. Owens, Juneau, Alaska	3	12.00	3	12.00	624	187.20	211.20
H. A. Dent, Scottsdale, Ariz.	2	8.00					8.00
Orville Mills, Seattle, Wash.	1	4.00					4.00
Ted Engstrom, Tacoma, Wash.	1	4.00	1	4.00	27	4.00	4.00
						Total	$532.90

[Endorsed]: Filed December 1, 1951.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the above-named defendants and move that the Court may amend its Findings of Fact and Conclusions of Law or make additional Findings of Fact and Conclusions of Law, and may amend the Judgment heretofore entered in the above-entitled cause according to the evidence given at the trial of the cause to conform to evidence and the law, and to find that the plaintiffs are not entitled to Judgment against the defendants, and to find that the defendants are entitled to Judgment against the plaintiffs, and for the basis of this motion defendants refer to and by reference adopt their allegations of error made in their motion to set aside the judgment and enter Judgment in favor of defendants, and in the alternative for a new

trial, which Motion is filed concurrently with this Motion.

Dated at Anchorage, Alaska, this 6th day of December, 1951.

DAVIS & RENFREW,

By /s/ WILLIAM W. RENFREW,
Attorneys for Defendants.

[Endorsed]: Filed December 6, 1951.

[Title of District Court and Cause.]

MOTION TO SET ASIDE JUDGMENT RENDERED IN FAVOR OF PLAINTIFF AND TO ENTER JUDGMENT IN FAVOR OF DEFENDANT OR IN THE ALTERNATIVE FOR A NEW TRIAL

Comes now the defendants and move that the Judgment rendered in the above-entitled matter by the above-entitled Court on the 27th day of November, 1951, in favor of the plaintiffs and against the defendants may be vacated and set aside and that Judgment may be entered in favor of the defendants and against the plaintiffs, and in the alternative move that a new trial may be granted in the matter.

This Motion is based upon the fact that the defendants, at the close of plaintiffs' case, moved for judgment, and that said Motion being overruled, the defendants at the close of all the evidence again moved for judgment, and for the reason that the

defendants believe the Court's ruling upon such Motions were erroneous, and for the further reason that the Findings of Fact entered by the Court in this matter are not supported by any substantial evidence, and for the further reason that the Conclusions of Law adopted by the Court are not supported by the Court's Findings of Fact, and for the further reason that the judgment entered by the court in favor of the plaintiffs and against the defendants is not supported by any evidence and is contrary to law, and for the reason that certain errors of law occurred during the course of the trial to which objection was made and exception saved by the defendants in the course of the trial and which resulted in prejudice to the defendants in the decision of the matter, all as hereinafter more fully set forth:

1. That there was no substantial evidence to justify a judgment in favor of the plaintiffs and against the defendants at the close of plaintiffs' case, and that the Court at that time should have granted defendants' Motion for Judgment.

2. That the Court should have granted defendants' Motion for Judgment made at the close of the entire case.

3. That the Court erred in making its Findings of Fact in that such Findings are not supported by any evidence but are contrary to the evidence in the cause.

4. That the Court erred in adopting its Conclusions of Law for the reason that such conclusions

are not supported by the evidence and are not supported by the Findings of Fact made by the Court and are contrary to law.

5. That the Court erred in entering Judgment in favor of plaintiffs and against the defendants for the reason that such Judgment is not supported by the evidence, and is contrary to the evidence, and is contrary to law, and for the reason that such Judgment is not supported by the Conclusions of Law adopted by the Court or by the Findings of Fact upon which said Conclusions are based.

6. That the Court erred in allowing the admission of certain testimony concerning the purchase price paid by Anderson for the boat TP 100 and then failed to admit evidence concerning the sale price received by Owens for the boat after its repairs which by this suit he is charging to the defendants.

Dated at Anchorage, Alaska, this 6th day of December, 1951.

DAVIS & RENFREW,

By /s/ WILLIAM W. RENFREW,

Attorneys for Defendants.

[Endorsed]: Filed December 6, 1951.

[Title of District Court and Cause.]

EXCEPTIONS ON BEHALF OF DEFENDANTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Comes now the defendants above named and object to certain of the Findings of Fact and Conclusions of Law and to the Judgment entered by the Court in the above-entitled matter on the 27th day of November, 1951, and requests that defendants may be allowed their exceptions to such matters for the reason set out with each particular objection and exception as follows:

1. Defendants desire to object to certain of the Findings of Fact made by the Court in the above-entitled matter and desire to state their exceptions to such Findings as follows:

(a) The portion of the third paragraph of such Findings which reads "the vessel forcibly struck a rock" for the reason that the same is not supported by the evidence.

(b) The fourth paragraph of such Findings which reads "After arriving in Seattle, the defendants decided to sell the vessel rather than have it repaired" for the reason that there is no evidence to support such Finding that the defendants decided to sell after arriving in Seattle or that the repairs of the vessel had anything to do with their decision to sell.

(c) That portion of the fifth paragraph of such

Findings which reads as follows "and made a casual inspection of the vessel" for the reason that from the evidence in this cause it appears that Owens was afforded opportunity to make a thorough inspection of the vessel.

(d) That portion of the seventh paragraph of the Findings of Fact which is to the effect that J. C. Anderson stated the "stem was damaged from striking a log" and that "the vessel could be put in first class shape for $5,000.00," for the reason that the evidence does not show that Anderson made such statements.

(e) The portion of the eighth paragraph of the Findings of Fact which recite for "$30,000.00 repaired" for the reason that the evidence shows that J. C. Anderson agreed to sell the vessel for $25,000.00 as is or $30,000.00 and make certain repairs.

(f) The thirteenth paragraph of such Findings which reads "A. E. Owens' knowledge of vessels was limited to what would ordinarily be acquired in traveling on them to and from his logging camps" for the reason that from the undisputed evidence Owens had previously purchased, operated and sold boats in connection with his logging operations.

(g) The fourteenth finding for the reason that the undisputed evidence shows in this cause that A. E. Owens had sufficient opportunity, unrestricted by the defendants, to inspect said vessel.

(h) The fifteenth finding for the reason that the undisputed evidence shows in this cause that A. E. Owens had sufficient opportunity, unrestricted by the defendants, to inspect said vessel, and that the

inspection made by Owens was sufficient to put him on notice that the engine was not in first class condition.

(i) The sixteenth finding for the reason that the same is not supported by the evidence.

(j) The seventeenth finding for the reason that the same is not supported by the evidence.

(k) The eighteenth finding for the reason that the same is not supported by the evidence in that defendants had ample opportunity to make a thorough inspection.

(l) The nineteenth finding for the reason that the same is not supported by the evidence.

(m) The twentieth finding for the reason that the same is not supported by the evidence.

(n) The twenty-first finding for the reason that the undisputed evidence in this cause shows that A. E. Owens had sufficient opportunity, unrestricted by the defendants, to inspect said vessel.

(o) That portion of the twenty-second finding which reads as follows: "an $966.80 for supervision by the plaintiffs' representative, Blanchard," for the reason that the same is not supported by the evidence.

(p) That portion of the twenty-fourth finding which reads in part "was necessary to restore the vessel to a fair condition" for the reason that the same is not supported by the evidence and for the further reason that such finding does not tend to substantiate any claim in the plaintiffs and against the defendants in light of the representations made

and the circumstances under which the vessel was purchased.

(q) The twenty-fifth finding for the reason that the same is not supported by the evidence.

(r) That portion of the twenty-sixth finding which reads "making a net of 54 days loss of use of the vessel" for the reason that the same is not supported by the evidence.

(s) That portion of the twenty-seventh finding which reads "the plaintiffs sustained a loss of profits in the sum of $7,919.64" for the reason that the same is not supported by evidence other than the statement of the plaintiff, A. E. Owens.

(t) The twenty-eighth finding for the reason that the same is not supported by the evidence.

(u) The twenty-ninth finding for the reason that the same is not supported by the evidence.

(v) Paragraph one of the conclusions of law for the reason that there is no evidence upon which to base such a conclusion and that such conclusion is not supported by the findings of fact made by the Court and that such Conclusion, if correct, is not sufficient to justify a judgment in favor of the plaintiffs and against the defendants.

(w) Paragraph two of the conclusions of law for the reason that by the undisputed evidence the vessel was sold "as is" and that such Conclusion is not supported by the findings of fact made by the Court and that such Conclusion, if correct, is not sufficient to justify a judgment in favor of the plaintiffs and against the defendants.

(x) Paragraph three of the conclusions of law

for the reason that by the undisputed evidence the vessel was sold "as is," and that such conclusion is not supported by the findings of fact made by the Court and that such conclusion, if correct, is not sufficient to justify a judgment in favor of the plaintiffs and against the defendants.

(y) Paragraph four of the conclusions of law for the reason that the undisputed evidence shows that A. E. Owens had ample opportunity to make a thorough inspection, and for the further reason that under the circumstances of the sale of the vessel made as disclosed by the evidence, the vessel was sold as is and no representations or warranties were made except that the vessel was in a fair condition, and that as disclosed by the evidence, the vessel was in a fair condition at the time of sale.

(z) Paragraph five of the conclusions of law for the reason that the same are not supported by the evidence and for the further reason that the evidence discloses that the plaintiffs purchased the vessel as is knowing that the vessel would require certain repairs rather than purchasing the vessel for $30,000.00; after repairs made by the defendants.

(aa) Paragraph six of the conclusions of law for the reason that the same is not supported by the evidence.

(bb) Paragraph seven of the conclusions of law for the reason that the same is not supported by the evidence and for the further reason that there is no evidence to support the conclusion therein contained; in that, there is no evidence that the sums

expended by the plaintiffs or any material portion thereof were required to place the vessel in a fair condition as represented by the defendants, and for the reason that there is evidence that the plaintiffs would not have lost as much use of the vessel as they did to place the vessel in first class condition, irrespective of any warranties or representations made by the defendants.

(2) Defendants wish to object to and to except to the judgment in favor of the plaintiffs and against the defendants as a whole, and in the alternative desire to object to the amount of the judgment.

(3) That as defendants believe, and so allege the fact to be, each and all of the objections and exceptions hereinabove mentioned are substantial and such findings and conclusions and judgment are inconsistent with substantial justice between the parties.

Dated at Anchorage, Alaska, this 6th day of December, 1951.

DAVIS & RENFREW,

By /s/ WILLIAM W. RENFREW,

Attorneys for Defendants.

[Endorsed]: Filed December 6, 1951.

[Title of District Court and Cause.]

MINUTE ENTRY

There appeared Robert Boochever of attorneys for plaintiffs, who advised the Court that he had served notice on counsel for defendants on January

4, 1952, that he would call up defendants' several motions against the Findings, Conclusions and Judgment, at this time. In view of the fact that defendants had submitted the motions without argument, the court at this time denied the same.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named defendants hereby appeal to the Court of Appeals of the United States of America for the Ninth Circuit from that certain Judgment entered in the above-entitled cause by the above-entitled Court on the 27th day of November, 1951, in favor of the plaintiffs and against the defendants in the amount of twenty-four thousand nine hundred seventy-eight and 32/100 dollars ($24,978.32), together with costs and attorneys' fees as will more fully appear from such judgment.

Dated at Anchorage, Alaska, this 27th day of December, 1951.

DAVIS & RENFREW,

By /s/ EDWARD V. DAVIS,

Attorneys for Appellants, Jack C. Anderson, Sr., and Jack C. Anderson, Jr., Co-Partners.

Receipt of copy acknowledged.

[Endorsed]: Filed December 27, 1951.

[Title of District Court and Cause.]

NOTICE OF HEARING OF DEFENDANTS' MOTIONS

Notice Is Hereby Given that the plaintiffs will call up for hearing before the above-entitled court at Juneau, Alaska, at 10:00 a.m., on January 14, 1952, or as soon thereafter as the same may be heard by the court, the defendants' motions to amend Findings of Fact and Conclusions of Law, to set aside Judgment rendered in favor of plaintiff, and to enter Judgment in favor of defendant or, in the alternative, for a new trial, and defendants' exceptions to Findings of Fact and Conclusions of Law and Judgment.

Dated at Juneau, Alaska, this 4th day of January, 1952.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Plaintiffs.

I Hereby Certify that a true and correct copy of the foregoing notice was mailed to Davis and Renfrew, Attorneys at Law, P.O. Box 477, Anchorage, Alaska, this 4th day of January, 1952.

/s/ R. BOOCHEVER,
Of Plaintiffs' Attorneys.

[Endorsed]: Filed January 5, 1952.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANTS' MOTIONS TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW, TO SET ASIDE JUDGMENT, TO ENTER JUDGMENT IN FAVOR OF DEFENDANTS OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, AND DEFENDANTS' EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

This matter coming before the Court upon the motion of the defendants to amend findings of fact and conclusions of law, to set aside judgment rendered in favor of plaintiffs and to enter judgment in favor of defendants or, in the alternative, for a new trial, and exceptions on behalf of defendants to findings of fact and conclusions of law and judgment, and the attorneys for the parties having stipulated that the foregoing motions and exceptions be decided without argument,

It Is Hereby Ordered that the foregoing motions and exceptions of the defendants be and the same are hereby denied and overruled.

Dated at Juneau, Alaska, this 11th day of January, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed and entered January 21, 1952.

Entered January 21, 1952.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

United States of America,
Territory of Alaska—ss.

Mary E. Renfrew, being first duly sworn, upon oath deposes and says:

That on the 6th day of February, 1952, I served copies of Notice of Appeal on John E. Manders, one of the attorneys for plaintiffs, by leaving said copies at the office of the said John E. Manders, in the Loussac Sogn Building at Anchorage, Alaska.

/s/ MARY E. RENFREW.

Subscribed and sworn to before me this 6th day of February, 1952.

[Seal] /s/ RETA OSBORN,
Notary Public for Alaska.

My Commission Expires 7-25-55.

[Endorsed]: Filed February 6, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Jack C. Anderson, Sr., and Jack C. Anderson, Jr., co-partners doing business as Anderson & Son Transportation Co., the above-named defendants, hereby appeal to the

Court of Appeals of the United States of America for the Ninth Circuit from that certain final judgment entered in the above-entitled cause by the above-entitled Court on the 27th day of November, 1951, in favor of the plaintiffs and against the defendants in the amount of twenty-four thousand nine hundred seventy-eight and 32/100 dollars ($24,978.32), together with interest, costs and attorneys' fees, as incorporated in the Judgment by subsequent order of the Court. As will appear from the records and files of this cause, defendants filed their Motion to Amend the Findings of Fact and Conclusions of Law and Judgment and their Motion to Set Aside the Judgment and to Render Judgment in favor of the defendants, and in the alternative their Motion for a New Trial in the manner provided by law and the Federal Rules of Civil Procedure and according to the process of the above-entitled Court. That such Motions were filed, and served, and entered by the Court, on the 6th day of December, 1951, and within the time allowed by Court rules for filing and service and entry of such Motions. That likewise as will appear from the records and files of the above-entitled Court, defendants-appellants filed Notice of Appeal from such Judgment on the 27th day of December, 1951, and that at that time defendants-appellants deposited with such Court the sum of two hundred fifty dollars ($250.00), in lawful money of the United States of America in lieu of a cost bond. That defendants-appellants desire that the sum of

two hundred fifty dollars ($250.00), deposited in lieu of a cost bond with the former Notice of Appeal may be considered as having been deposited with this Notice of Appeal. That thereafter and on or about the 11th day of January, 1952, the Honorable George W. Folta, Judge of the above-entitled Court, entered a Minute Order overruling each and all of the Motions made by the defendants-appellants directed to the Judgment above described, and that the Order overruling defendants' said Motions was entered by the above-entitled Court on the 21st day of January, 1952.

Dated at Anchorage, Alaska, this 6th day of February, 1952.

DAVIS & RENFREW,

By /s/ EDWARD V. DAVIS,
Attorneys for
Defendants-Appellants.

[Endorsed]: Filed February 6, 1952.

[Title of District Court and Cause.]

MOTION

Comes now Davis & Renfrew, attorneys for the defendants-appellants, and moves the Court for an Order granting an additional ten days within which to perfect their appeal taken in the above-entitled action.

Dated at Anchorage, Alaska, this 7th day of March, 1952.

DAVIS & RENFREW,

By /s/ EDWARD V. DAVIS,

Attorneys for

Defendants-Appellants.

Service of copy acknowledged.

[Endorsed]: Filed March 10, 1952.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING APPEAL

Upon reading and filing the Motion of Davis & Renfrew, attorneys for defendants-appellants, requesting additional time within which to file and docket the record of the above-entitled cause with the Court of Appeals, and the Court being fully advised in the premises, it is

Hereby Ordered that defendant-appellants shall have to, and including, the 27th day of March, 1952, to file and docket the record of the above-entitled cause with the Court of Appeals.

Dated at Anchorage, Alaska, this 10th day of March, 1952.

/s/ GEORGE W. FOLTA,

District Judge.

[Endorsed]: Filed and entered March 10, 1952.

Entered March 10, 1952.

In the District Court for the Territory of Alaska, Division Number Three, at Anchorage

No. A-5226

A. E. OWENS, FERN OWENS, and R. F. OWENS, Co-Partners, Doing Business as OWENS BROTHERS,

Plaintiffs,

vs.

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., Co-Partners, Doing Business as ANDERSON & SON TRANSPORTATION CO.,

Defendants.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 8th day of March, 1951, at 10:30 o'clock a.m., at Anchorage, Alaska, the above-entitled cause came on for trial without a jury; the Honorable George W. Folta, United States District Judge, presiding; the plaintiff A. E. Owens appearing in person and by Robert Boochever and John E. Manders, of his attorneys; the defendants appearing in person and by William W. Renfrew, of his attorneys;

Whereupon, the following occurred:

The Court: Do counsel feel that they would like to outline the case any more than it is in the pleadings?

Mr. Boochever: Possibly, your Honor, a brief statement might be in order.

The Court: Very well.

Mr. Boochever: This case arose out of a purchase [1*] of a vessel, TP 100, which is now known as the Adak, and in March, 1947, Mr. A. E. Owens, one of the partners of Owens Brothers, was in Seattle and was interested in purchasing a boat, a tugboat, for use in his logging operation. The defendants, Mr. Anderson, Senior and Junior, had a TP 100 tug, and through Mr. Morgan, who was also in Seattle, Mr. Owens contacted Mr. Anderson and went aboard the vessel, and Mr. Anderson showed Owens the vessel, and they represented that the vessel was in good condition, good seaworthy condition, and they knew that the Owenses wanted a vessel for their logging operation and they were informed to that effect and they stated that the only difficulty with the engine was that one crankpin was scored and would have to be turned and that the forefoot had been slightly bruised when they hit a log on the way down and that the vessel wasn't leaking and that otherwise it was in good condition and that a total cost of five thousand dollars would put it in first-class shape. Too, they offered to sell the vessel for twenty-five thousand dollars, or in the alternative they would repair the vessel for thirty thousand dollars, and subsequently Mr. Owens agreed to purchase the vessel for twenty-five thousand dollars, five thousand to be paid down and the balance on a mortgage to the, I believe, the First National Bank, to a bank in Anchorage anyway, and at the time Mr. Owens had never had a mechanic or anyone else go over the

*** Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

engine. He had never had the vessel taken out of the water. [2] The boat was in murky water so that you could not see below the water line, and he had relied entirely on the representations made by Mr. Anderson. Now, we believe that the evidence will show conclusively that these representations were made falsely and that the vessel, instead of having one crankpin bearing that was bad, had the whole crankshaft badly twisted and warped. The oil couplings were filled with melted babbitt. The tail shaft was found to be badly pitted and had to be replaced in order to have the vessel insured. Then subsequently the vessel was taken out of the water, and it was discovered that the whole front end was practically demolished. The forefoot was completely destroyed. The stem was badly damaged. The metal stem plate was banged off almost completely, and the boat was taking water. The only thing that kept it from showing was the forward watertight compartment that kept it from getting into the rest of the boat where it could be seen, and it was leaking badly at the time that it was sold and represented as being in a seaworthy condition, and, as a result of these misrepresentations, it became necessary for the Owens Brothers to repair the vessel at a cost in excess of twenty-six thousand dollars rather than the five thousand dollars alleged. In addition to that an additional nine hundred and thirty-four dollars was spent by Mr. Owens in traveling to and from the vessel in order to supervise the

repairs which would not have been necessary if the vessel was as represented. [3]

And, moreover, before all these damages were discovered Mr. Anderson came around and requested that he borrow a lifeboat which was on the vessel and which he needed. He needed another lifeboat to get clear through the Coast Guard to take his own boat back to Alaska, and he agreed to return that lifeboat at the Owens Brothers camp near Ketchikan, Alaska. He took the lifeboat and he has never returned it to this day, and that lifeboat has a reasonable value of one thousand dollars. Also as a result of misrepresentations, we will show that the boat was laid up for a period of approximately one hundred and five days and that about seventy-five days of that time, at least that much of that time, was due to the misrepresentations. In other words, if the boat had been as it was represented, it could have been fixed in probably a week or two and at a maximum of thirty days time, and that, if the Owens Brothers had had the use of the vessel during that time, they would have been able to have netted approximately eleven thousand dollars. So that all of those items will be shown by the plaintiff in this case, and we feel that judgment at the end of the case should be entered in the amount requested in the complaint.

Mr. Renfrew: We waive, your Honor.

The Court: Call your first witness. [4]

Plaintiffs' Case

ALMON E. OWENS

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, please?

A. My name is Almon E. Owens.

Q. Are you a partner in the firm known as Owens Brothers? A. I am.

Q. Who are the other partners?

A. My wife Gertrude Fern, and my brother Roland F.

Q. And were you engaged in partnership business in the year 1947? A. I was.

Q. And what was your business at that time?

A. We were logging.

Q. And in 1947 did you meet the defendants in this case, Mr. Anderson, Jack Anderson, Senior, and Junior?

A. I did. At that time I was in Seattle and I was looking for a tugboat. I was down at the dock there in Ballard with Mr. Tom Morgan. He was loading his boat to come north, and this tug, the TP 100, was laying there at the dock at that time. He told me it was for sale and took me and introduced me to Mr. Anderson, and then Mr. Anderson and his son both took me through the boat and specified at that time that the only thing that was the matter with [5] the boat was one

(Testimony of Almon E. Owens.)

crankpin to be turned and that the forefoot of the boat had been bruised in striking a log on the way down to Seattle.

Q. Did he make any other representations to you about the boat at that time?

A. He represented it was in first-class condition with those exceptions.

Q. Did he state anything about whether the boat was leaking or not?

A. He stated it wasn't leaking, that the boat was tight. There was no evidence in the back part of the boat that it was taking any water.

Q. Was there any discussion of terms?

A. At that particular moment I think not. He stated their price for the boat was twenty-five thousand if we took it as it was there, or that they would put it in first-class condition for thirty thousand dollars.

Q. And did he say anything about how much it would cost to put it in first-class condition?

A. He said that it wouldn't exceed five thousand dollars to put it in first-class condition.

Q. Now, did you see Mr. Anderson again?

A. I saw him several different times. I think the next time I saw him I took Mr. Howard Dent down there to look over the boat with the idea of financing it for me, and he made [6] the same representations to Mr. Dent and myself that he had before.

Q. Did Mr. Dent subsequently finance the boat for you? A. He did not.

(Testimony of Almon E. Owens.)

Q. He has no interest in the boat?

A. No, sir.

Q. Did you eventually make any agreement in regard to the purchase of this boat?

A. Later on we did. We made an agreement to purchase the boat for twenty-five thousand dollars; five thousand dollars cash, and two thousand dollars a month until the balance was paid off.

Q. Was that agreement reduced to writing?

A. It was.

Q. I show you what purports to be an agreement and ask you if you can identify this instrument?

A. That is a copy of the agreement.

Mr. Renfrew: Your Honor, I have no objection to the agreement. However, there is a purported assignment of some nature on the reverse thereof which obviously is not a copy as the same was originally prepared. I haven't had time to read it to determine what the difference is, but there seems to be considerable difference. I would like to inquire of the witness first if he knows anything about that.

The Court: You may do so. [7]

Mr. Renfrew: Mr. Owen, I will ask you if you know how the third page of that happened to be prepared?

A. At that time there was, I believe that Mr. Anderson had, a mortgage on the boat and it had to be turned over to the First National Bank, or

(Testimony of Almon E. Owens.)

this bank here, to handle, and our payments were made to the bank.

Mr. Renfrew: But at the time that the agreement was prepared it was prepared in the office of your attorneys, Chadwick, Chadwick & Mills in Seattle, was it not?

A. Correct.

Mr. Renfrew: And that third page, which is attached thereto, was not prepared by Chadwick, Chadwick & Mills; isn't that correct? Examine the entire document, sir.

A. I couldn't tell you that.

Mr. Renfrew: Well, I will hand you this. This is a carbon copy of the agreement that you are offering in evidence, of the first two pages, and the third page likewise is prepared by Chadwick, Chadwick & Mills on their stationery. But I notice that the third page on the document you are offering in evidence is an original and obviously prepared on another typewriter at some other time.

A. I think that is just additional to the agreement; it is acceptance of this by the bank, as I understand it.

Mr. Renfrew: Am I to understand that when you received that back from the bank that they had changed the terms [8] of their acceptance?

A. I think there was no special change in the terms, no; but the bank, I think, had to accept the agreement.

Mr. Renfrew: Will you kindly examine the document which I have handed you there? Look at the

(Testimony of Almon E. Owens.)

first page and the second page, are identical carbon copies of the agreement you are offering in evidence; is that correct as near as you can see?

A. I believe so.

Mr. Renfrew: Now, look at the third page. Examine the third page, please, of the document I handed you. Now, that was also prepared by Chadwick, Chadwick & Mills, was it not?

A. That is correct, but it is not signed.

Mr. Renfrew: No, it is not signed. Now, I ask you if you have any explanation to offer as to how you come into possession of one that obviously was prepared at a different time by someone else?

A. I think it was prepared by the bank themselves. That is my impression of it.

Mr. Renfrew: Without examining the third page of the document, your Honor, I don't even know that it has any material effect, but I object to the introduction of that as not being a part of the original agreement.

Mr. Boochever: I have no objection to withdrawing [9] the third page. It is the acceptance of the bank of the contract, and I don't think it has any bearing on the case at all, so I will withdraw that, and with that exception I will request that this be introduced as Paintiffs' Exhibit 1.

Mr. Renfrew: No objection.

The Court: It may be admitted and marked Plaintiffs' Exhibit 1.

(Testimony of Almon E. Owens.)

PLAINTIFFS' EXHIBIT No. 1

Agreement

This Agreement made and entered into this 1st day of April, 1947, at the City of Seattle, Washington, by and between Jack C. Anderson, Senior, and Jack C. Anderson, Junior, co-partners, doing business as Anderson & Son Transportation Company, as First Parties, and A. E. Owens, Fern Owens and R. F. Owens, co-partners, doing business as Owens Brothers, Second Parties,

Witnesseth:

That Whereas, First Parties have purchased from the War Surplus Agency, Fort Richardson, Anchorage, Alaska, one TP 100 Army Tug and passenger boat for which first parties presently hold delivery certificate and which boat is presently located at the A. R. B. Packing Company dock, Lake Union, Seattle, Washington, and

Whereas, First Parties are desirous of selling and Second Parties are desirous of purchasing said boat, and

Whereas, First Parties have not yet received their bill of sale covering said boat nor has said boat been documented as required by law, and

Whereas, the First National Bank of Anchorage, Alaska, presently holds a mortgage, covering said boat and other equipment, made and executed by the First Parties as security for the payment of

(Testimony of Almon E. Owens.)

Plaintiffs' Exhibit No. 1—(Continued)

Thirty Thousand Dollars ($30,000.00) and interest, and

Whereas, the parties hereto are desirous of reaching an understanding as to the sale and purchase of said boat to be effective as soon as the First Parties are able to procure a bill of sale for said boat and the proper documenting thereof,

Now, Therefore, It Is Agreed as follows:

(1) That the First Parties agree to sell and Second Parties agree to purchase said TP 100 Army tug and passenger boat, being 96 feet 6 inches in length with a tonnage of approximately 250, as presently equipped and where presently located, at a purchase price of Twenty-five Thousand Dollars ($25,000.00).

(2) It is understood and agreed that the sale of said boat shall be effected at the earliest possible date and as soon as the First Parties have procured a due and legal bill of sale covering said boat and the documentation thereof, unless it is possible that the documentation may be procured through the Second Parties in which event the sale shall be effected as soon as the bill of sale has been procured by the First Parties.

(3) The agreed purchase price shall be Twenty-five Thousand Dollars ($25,000.00), of which purchase price the sum of Five Thousand Dollars ($5,000.00) shall be paid in cash upon the closing

(Testimony of Almon E. Owens.)

Plaintiffs' Exhibit No. 1—(Continued)

of said sale, and a bill of sale shall thereupon be given by the First Parties to the Second Parties, and the Second Parties shall thereupon execute and deliver unto the First Parties a promissory note for the balance of the purchase price in the sum of Twenty Thousand Dollars ($20,000.00), dated as of the date of closing said sale and bearing interest thereafter at the rate of eight per cent (8%) per annum and payable at the rate of Two Thousand Dollars ($2,000.00) a month plus interest on the unpaid balance at the rate of eight per cent (8%) per annum, with the first monthly payment falling due thirty days (30) after the date of consummation of said sale and further payments falling due upon the corresponding date of each and every month thereafter until the full amount of principal and interest shall have been paid; said promissory note to be further secured by a mortgage executed in due and legal form by the Second Parties to the First Parties as mortgagee.

(4) It is further agreed that the Second Parties shall procure the endorsement of said promissory note by Thomas A. Morgan of Juneau, Alaska, before delivery to the First Parties and that the First Parties will thereupon cause said promissory note to be endorsed and negotiated and said mortgage assigned to the First National Bank of Anchorage, Alaska, and will procure from the First National Bank of Anchorage, Alaska, in consider-

(Testimony of Almon E. Owens.)

Plaintiffs' Exhibit No. 1—(Continued)

ation of such negotiation of said note and assignment of said mortgage the release by First National Bank of Anchorage, Alaska, of the said boat from the said mortgage heretofore given by First Parties to the First National Bank of Anchorage, Alaska.

(5) It is further agreed that the Second Parties will upon the consummation of the sale of said boat procure and carry insurance covering said boat to the full limit of the balance owing on said promissory note and mortgage to the satisfaction of the First Parties and the First National Bank of Anchorage, Alaska, and maintain such insurance with the First Parties or the First National Bank of Anchorage, Alaska, as insured, as their interest may appear until the balance on said note and mortgage has been fully paid.

(6) It is further agreed that provisional delivery of said boat shall be given to the Second Parties this date, and that the Second Parties shall be responsible for said boat to the extent of the agreed purchase price after this date.

(7) It is further agreed that the Second Parties shall upon the execution of this agreement lodge with Chadwick, Chadwick & Mills of Seattle, Washington, the sum of Five Thousand Dollars ($5,000.00) for payment and delivery to First Parties upon the consummation of the sale by the procuring of a bill of sale by the First Parties and documentation of the boat as required and the

(Testimony of Almon E. Owens.)

Plaintiffs' Exhibit No. 1—(Continued)

execution by First Parties to Second Parties of a proper bill of sale covering said boat.

(8) It is further agreed that all payments on said boat and upon the promissory note and mortgage to be given on the purchase of said boat shall be made to the First Parties through the First National Bank of Anchorage, Alaska, for application upon the account of the First Parties as owing to said bank.

In Witness Whereof, the parties hereto have affixed their signatures the day and year hereinabove first written.

ANDERSON & SON TRANSPORTATION COMPANY,

By /s/ JACK C. ANDERSON, SR.,

By /s/ JACK C. ANDERSON, JR.

OWENS BROTHERS,

By /s/ A. E. OWENS.

Admitted in evidence March 8, 1951.

Mr. Boochever: Your Honor, at this time I would like to interpose a request which I intended to make before we commenced with the actual trial and I didn't get around to it. Mr. Mills, who was the attorney who represented Mr. Owens and han-

(Testimony of Almon E. Owens.)

dled the affairs at the beginning of this matter, was going to be a witness at this trial, but he found he had to attend a trial before the court in Seattle at this exact time or just about, and I would like to have a continuance at the end of the trial in order to secure a deposition from Mr. Mills before the case is decided. Until two days ago he thought he was coming.

The Court: Any objection?

Mr. Renfrew: No objection, your Honor, provided we have the same consideration. We have a witness, Mr. A. W. Dawe, who was due to be here, your Honor, and I received a telegram dated March 6th that "Dawe, due to flu, will be unable to attend trial." Apparently he is ill, and with the same consideration so I can get Mr. Dawe's deposition, I won't [10] object.

The Court: Do you mean if it turns out to be necessary, or do you anticipate now that you will want to have it in any event?

Mr. Renfrew: That, your Honor, will depend on whether or not it is necessary.

The Court: Well, of course the same right is accorded both parties.

Mr. Renfrew: Thank you, your Honor.

Q. (By Mr. Boochever): Mr. Owens, we introduced this agreement which was entered into. After that agreement what took place in regard to the boat?

A. Anderson and his son moved the boat for me

(Testimony of Almon E. Owens.)

from where it was moored in Ballard up to the Stikine Fish Company Dock in Lake Union.

Q. Did they start the engine and drive it over?

A. Yes; they started the engine and took it up there.

Q. Now, up to this time had you been able to look below the surface of the water at the vessel at all?

A. Not at all. The water in Lake Union is so dark that it is almost impossible to see anything.

Q. And had you looked at the engine or torn it down or looked inside of it or anything of that nature?

A. I had just looked into this one bearing that they reported [11] needed to be smoothed up.

Q. And did you rely on anything in making this purchase of the vessel?

A. I relied on their representations entirely.

Q. And that was the basis that you purchased the vessel? A. Correct.

Q. And you say you moved the vessel then, or the Andersons moved it for you, and where was it then tied up?

A. Stikine Fish Company Dock in Lake Union.

Q. What did you then do with the vessel?

A. Then we immediately proceeded to get a man to come down there and turn that bearing for us.

Q. And whom did you get?

A. The Wilson Motor Company, I believe, is the party.

Q. And did he proceed to turn the bearing?

(Testimony of Almon E. Owens.)

A. That is correct. He turned the bearing and made a good job of it.

Q. And did that fix the engine up then?

A. Far from it.

The Court: Well, what kind of bearing was this?

A. Connecting rod bearing on the crankshaft, your Honor.

Q. And when that was done, what did you then have done?

The Court: Well, wait a minute. Maybe my knowledge is deficient, but it seems to me there wouldn't be any connecting rod bearing on the crankshaft. There are bearings for the [12] crankshaft, and, I suppose, bearings for the connecting rod, but, when you say "connecting rod bearing on the crankshaft," that is something new to me.

A. The crankshaft; as you call it, a bearing; that is what I would call it.

The Court: Well, do you mean it is a part of the connecting rod?

A. No. Part of the crankshaft; the crankshaft itself.

The Court: But you said it was a bearing; it was a connecting rod bearing on the crankshaft.

A. Perhaps I misspoke.

The Court: Then it was a crankshaft bearing, or was there more than one bearing?

A. In this particular case there was just the one bearing that showed any fault. It was the crankshaft itself where the bearing connects to it.

(Testimony of Almon E. Owens.)

The Court: Well, now is this something in addition to the pin that you mentioned?

A. Call it the crankpin; they call it crankpin lots of times on the crankshaft. It is the same bearing that I am referring to all the time.

The Court: Well, there has been something said about a pin. Now, is that something else?

A. Lots of times you speak of it as a crankpin.

The Court: You mean you speak of a crankshank [13] bearing as a pin?

A. It is the crankshaft itself, you understand, where the connecting rod fastens on.

Mr. Renfrew: I am unable to hear the witness, your Honor. I hate to interrupt. Will you speak a little louder, please?

A. I say that where the connecting rod fastens on to the crankshaft is often referred to as the crankpin or the crank connecting rod bearing. What I am referring to is a part of the crankshaft itself. In speaking of it, it is often spoken of as the crankpin or the connecting rod bearing.

The Court: Well, am I to understand that you use the word "pin" synonymously with crankshaft?

A. Not as crankshaft, but as the connecting rod bearing. I believe that is correct.

Mr. Renfrew: Your Honor, I am sorry, but I have been unable to hear the witness. Could he use the microphone?

The Court: Will you speak loud enough so that everybody can hear and, if you have difficulty

(Testimony of Almon E. Owens.)

speaking loud enough, you will have to use the microphone. Well, I think that what the witness has in mind then is a connecting rod pin. Now, that raises another question. According to the complaint here, as I understand it, this pin was scarred.

Mr. Boochever: Your Honor, I don't know my engines [14] too well, but it is not a connecting rod pin. As I understand it, this is a part of the crankshaft. It is either the crankshaft pin or crankshaft bearing. It is called both names, as I understand it.

The Court: Well, there isn't anything that would be wider in difference than a pin and a bearing. That is what puzzles me. The two are wholly different things. A bearing is something that is hollow for the crankshaft to fit in if it is for the crankshaft. The pin is something like a——

Mr. Boochever: In other words, your Honor, the bearing fits over the pin; is that correct?

The Court: There is a pin, you can call it such, or pins, by which the lower half of the connecting rod bearing is fastened to the upper half. I don't know whether that is what he means or not.

Q. Well, Mr. Owens, can you describe a little more in detail just what this pin or bearing was that you understood had to be repaired?

A. Well, it is the crankpin on the crankshaft itself.

The Court: Well, what does it look like?

A. You know how a crankshaft is built?

The Court: Yes.

(Testimony of Almon E. Owens.)

A. It is a large place on the shaft where your bearing fastens on from the crankshaft. I believe it was No. 3 bearing; I am not sure; No. 3 pin that was bad. [15]

The Court: Well, what was the matter with it?

A. The bearing had burned out and it had been allowed to run and had scored the shaft.

The Court: Well, what effect would that have on the pin?

A. It was scored, your Honor.

The Court: You mean the pin was scored?

A. Scored; that is correct.

The Court: As well as the bearing?

A. The bearing was burned out entirely, the bearing itself; but the pin itself was badly scored, and it was a matter of smoothing out this pin.

The Court: Well, but the pin doesn't serve the purpose of a bearing. It just holds something together, doesn't it?

A. Correct. But it is often spoken of as the crankpin on the crankshaft itself. There are lots of crankshafts where there is a single engine that only have one pin, but an engine with as many cylinders as this had, six, there would be six crankpins really.

The Court: Well, what does the crankpin look like?

A. It is a portion of the shaft, your Honor, where your connecting rod fastens on to the shaft.

The Court: And you say it is a part of the shaft?

(Testimony of Almon E. Owens.)

A. Right. [16]

The Court: Not a part of the connecting rod?

A. No. It is where the connecting rod fastens on to the crankshaft, drives the shaft.

The Court: Well, certainly I understand the function of a connecting rod, but I don't understand where this pin is. Maybe it isn't important.

A. It is important, your Honor.

Q. Mr. Owens, do you think you could draw a sketch to show where the pin would be?

A. I am not an artist, your Honor.

The Court: You don't have to be. Can you draw a sketch sufficient to illustrate what it would be?

A. I believe I can, your Honor. (Drawing.) This is what I refer to. I refer to this part here where the connecting rod fastens on to the crankshaft.

The Court: Isn't that what is called the crank?

A. I wouldn't know. I have always referred to it as the crankpin.

Mr. Boochever: May I see the sketch? I don't imagine there would be much useful purpose in introducing this?

The Court: No. I know what he means now.

Q. Now, you say that you had this—I don't want to get lost in the words again—you had the crankpin turned down by Mr. Wilson?

A. That is right. [17]

Q. Was that fixed then so the engine would work properly?

(Testimony of Almon E. Owens.)

A. After that was done we got Fairbanks-Morse's head mechanic over there to inspect the engine.

Q. And did he make a thorough inspection of the engine then?

A. That is correct; he did. And he took off some of the other crankshaft bearings to open up the crankshaft and found that the crankshaft was very badly scored in other places, some places as much as three-sixteenths of an inch the bearings were scored.

Q. And what did he recommend?

A. He recommended that the crankshaft be taken out and taken to a machine shop and returned.

Q. Now, prior to this had you paid Mr. Wilson for his work on the engine?

A. That is correct.

Q. I will show you what purports to be a check made to Wilson Machine Works dated May 8, 1947, and ask you if you can identify that?

A. That is right.

Q. What is that?

A. That is the check we paid Mr. Wilson.

The Court: That is a check in payment of what?

A. For the turning down of this crankshaft.

The Court: Well, did you also require a replacement of the crankshaft bearings? [18]

A. We did, yes.

The Court: All of them?

(Testimony of Almon E. Owens.)

A. Later on they all had to be replaced, and we had to replace the crankshaft as well.

Mr. Boochever: I think, your Honor, that will be developed in the testimony following. I request that this be introduced as Plaintiffs' Exhibit No. 2, which is a check in the sum of three hundred dollars made payable to Wilson Machine Works.

The Court: It may be admitted and marked Plaintiffs' Exhibit No. 2.

Q. Now, after the Fairbanks-Morse man inspected the engine, what did you find had to be done to it?

A. He recommended we take the crankshaft out and take it to the machine shop and have it returned and, since we had to tear the engine down completely and take the crankshaft out, it was taken to the machine shop and, when it was put in a lathe, it was found that the shaft had been so badly heated that it was warped and twisted, and we couldn't use it at all.

Q. And what did you have to do then?

A. We had to buy a new crankshaft.

Q. I show you two statements from Fairbanks-Morse Company and ask you if you can identify them? A. Correct. [19]

Q. What are they?

A. Bills from the Fairbanks-Morse & Company for the crankshaft and the insurance.

Mr. Renfrew: No objection.

Mr. Boochever: I request these be introduced as Plaintiffs' Exhibits 3 and 4.

(Testimony of Almon E. Owens.)

The Court: They may be admitted and so marked.

Q. Now, I show you what purports to be a check made payable to the Fairbanks-Morse Company for $6,056.66. Can you identify that? A. Yes.

Q. What is that?

A. That is for the crankshaft and insurance.

Mr. Renfrew: I object to this on the ground, your Honor, that there is no itemization of this $6,056.66, no way of connecting it with the repairs of this vessel.

Mr. Boochever: Well, your Honor, I believe that the exhibit just presented prior to this shows clearly what it is for.

Mr. Renfrew: Is that a total of $6,056.66?

Mr. Boochever: I believe it is.

Mr. Renfrew: If that is correct, it would be——

Mr. Boochever: If it isn't the same, it is within a matter of cents of it. I am sure it is the same.

The Court: Then the objection will be [20] overruled and, if you wish to cross-examine him on it, you may do so.

Mr. Renfrew: All right.

Mr. Boochever: I request this be introduced as Plaintiffs' Exhibit No. 5.

(Whereupon, the exhibit was admitted and marked Plaintiffs' Exhibit No. 5.)

Q. Now, did the Fairbanks-Morse Company then work on taking the engine apart and putting in a new crankshaft for you?

(Testimony of Almon E. Owens.)

A. They tore it down but, in order to get the crankshaft out, and at that time there was some delay in getting the crankshaft, and the boat was moved down to the yard for haul out and ascertaining the damage to the forefoot.

Q. Now, while we are still on the work that Fairbanks-Morse did, I show you what purports to be a statement dated June 10, 1947, and another statement for August 20, 1947, for various work performed on the vessel Adak, and ask you if you can identify those statements? A. Correct.

Q. What are they?

A. They are invoices for work they did on the engine.

Q. And did you pay those bills?

A. Correct. We paid them.

Mr. Renfrew: No objection.

Mr. Boochever: I request—I think these three pages could be introduced as one exhibit, as Plaintiffs' Exhibit 6. [21]

The Court: They may be admitted and marked Plaintiffs' Exhibit 6.

Q. Now, you state that you then had the boat brought up to put on dry dock; is that correct?

A. That is correct.

Q. Where was that done?

A. Pacific Electrical and Mechanical Company's ways.

Q. And did you discover anything else about the vessel when it was put up on dry dock?

A. When the boat was put on dry dock there

(Testimony of Almon E. Owens.)

was some trouble on getting it on, on account of the bow stem having been broken and hanging down in the way, and when it was on the dock it was apparent the bow stem was completely gone. The forefoot was all shattered and of no use at all, and about six feet of the keel was also broken off, and several of the planks were ruined.

Q. Now, were you able to ascertain that damage while the boat was floating in the water?

A. I was not. I didn't see anything, and there was no way I could see under the water there in Lake Union to see that.

Q. Did you have any pictures taken of the fore part of the vessel?

A. We had two pictures taken after it was on the ways.

Q. Now, I show you a picture here, and ask you if you can identify that? [22] A. I can.

Q. What is that?

A. It is a picture of the bow of the boat.

Q. As it was at what time?

A. After it was on the ways.

Q. About when was that?

A. I believe early, it was early in May.

Q. What year? A. 1947.

Q. And is this a true representation of the way the fore part of the vessel looked at that time?

A. Yes; that is a true representation.

Mr. Renfrew: May I inquire? Mr. Owen, did you take this picture?

(Testimony of Almon E. Owens.)

A. It was taken by a commercial photographer in Seattle.

Mr. Renfrew: Did you see him take it?

A. I didn't see him take it, but I saw the boat afterwards and I would swear that was a correct representation.

Mr. Renfrew: May I have just a moment, your Honor, please? Could you state, if this is a picture of the TP 100, the date that it was taken?

A. It was sometime in May, I believe.

Mr. Renfrew: Were there a number of this type? This was an Army-built boat?

A. That is right. [23]

Mr. Renfrew: And there were quite a number just alike?

Mr. Boochever: Your Honor, I believe this is all a matter for cross-examination.

The Court: Yes; I think so, too, particularly where there is no jury. You can't be prejudiced by this where you have a right to cross-examine.

Mr. Renfrew: I didn't understand.

The Court: I say where there is no jury you wouldn't be prejudiced by the admission of this into evidence even though on your cross-examination the Court would have to exclude it.

Mr. Renfrew: I am of the opinion, your Honor, if he ties it down with the vessel in question, that I wouldn't object. I have talked to the engineer, and he says it isn't, so I object to it.

The Court: Well, but he says it correctly represents the condition of the vessel, that he inspected

(Testimony of Almon E. Owens.)

the vessel at the time it was on the dock, so on that prima facie showing the Court will have to overrule the objection, and it will be admitted.

Mr. Boochever: That, I believe, is Plaintiffs' Exhibit 7.

(Whereupon, the exhibit was marked Plaintiffs' Exhibit 7.) [24]

Q. I show you another photograph, and ask you if you can identify this photograph?

A. That is right.

Q. What is that?

A. That is also a picture of the bow of the boat.

Q. And that is the vessel you have been talking about all the time here? A. That is correct.

Q. And is this a true representation of the way the boat looked when it was taken up on the ways there on or about May of 1947?

A. That is right.

Mr. Renfrew: Same objection, your Honor.

The Court: Same ruling.

Mr. Boochever: I request that this be introduced as Plaintiffs' Exhibit No. 8.

(Whereupon, the exhibit was admitted and marked Plaintiffs' Exhibit No. 8.)

Q. Now, I believe you testified that you were told that the forefoot was slightly bruised by striking a log. Would you show, would you indicate where the forefoot is on that picture?

A. I would say it was gone.

(Testimony of Almon E. Owens.)

Q. Completely gone?

A. Completely gone. [25]

Q. And what other indication of damage is there on that picture to that vessel?

A. The bow stem is completely gone, under water, and the keel is damaged, and the forefoot is not there.

Q. Was the vessel taking water in the forward part of the vessel here where this damage was done?

A. It was ascertained that the vessel was taking water, was full of water in front of the watertight bulkhead in the forepart of the boat.

Q. Had you inspected in front of the watertight bulkhead before you purchased the vessel?

A. No, sir.

Q. Now, how about the tail shaft of the vessel; when you went about making these repairs, what was discovered regarding it?

A. The insurance company asked us to pull the tail shaft to ascertain its condition, and found that it was badly eaten up with electrolysis.

Q. And what was necessary to be done in that regard?

A. They demanded a new tail shaft before they would give us any insurance on it.

Q. And did you have a new tail shaft put in the vessel? A. We did.

The Court: Was that a bronze tail shaft?

A. Steel bronze covered in the bearing. [26]

The Court: Bronze coated?

(Testimony of Almon E. Owens.)

A. It had a bronze sleeve on the bearings.

Q. Now, I will show you what purports to be a statement from the Diesel Engineering Company of Seattle, Washington, one statement in regard to a new tail shaft, and another one in regard to making a stuffing box, and ask you if you can identify those? A. I can.

Q. What are they?

A. They are the bills from the Diesel Engineering Company for a tail shaft and a stuffing box.

Mr. Renfrew: No objection.

The Court: They may be admitted and marked.

Mr. Boochever: Plaintiffs' Exhibits Nos. 9 and 10.

Q. And I show you a check made payable to the Diesel Engineering Company in the sum of $1,222.04, and ask you if you can identify that?

A. I can.

Q. What is that?

A. It is the check for the tail shaft and the stuffing box.

Q. As represented by those statements that we just introduced into evidence?

A. That is correct.

The Court: It seems to me that you didn't introduce a check for the—— [27]

Mr. Boochever: For the Fairbanks-Morse? That is right. I will question him on that.

Mr. Renfrew: No objection.

The Court: It may be admitted.

Clerk of the Court: Plaintiffs' Exhibit 11.

(Testimony of Almon E. Owens.)

Q. Now, did you have the battery inspected?

A. That is correct; the batteries were.

Q. And what was the condition of the battery?

A. Very poor condition.

Q. And did work have to be done on the battery?

A. We had to have them overhauled and new plates put in several of them.

Q. And who did that work?

A. The battery company there in Seattle. I have forgotten the name.

The Court: Well, what kind of batteries were they? Wet?

A. Wet batteries; yes, sir.

Q. I show you a check here, and ask you if you can identify this check? A. Correct.

Q. What is that check?

A. It is payment to the Canal Electric Company for repairing the batteries.

Q. In what sum? [28] A. $632.42.

Mr. Renfrew: No objection.

The Court: It may be admitted and marked.

Clerk of Court: Plaintiffs' Exhibit 12.

Q. Now, when you found these damages to the forward end of the vessel, what had to be done in that regard?

A. I had to put in a new bow stem, several new planks, repaired the keel and put in the new forefoot.

Q. And who did that for you?

A. I forget the name of the outfit.

(Testimony of Almon E. Owens.)

Q. I show you an invoice——

Mr. Boochever: Possibly I could speed this up by showing the invoice and the check at the same time and make them one exhibit if there is no objection.

Mr. Renfrew: No objection.

Q. An invoice of the Pacific Electrical & Mechanical Company in regard to repair of the forefoot, stem and keel, renew planks, do other work as directed, and three checks, and ask you if you can identify them? A. I can.

Q. What are they?

A. The invoice for the repair of the front end of the boat and the checks in payment.

Q. And what do those checks amount to, those three checks there? [29]

A. I can't remember.

Q. Read them.

A. One check for $2,390.03; two for $3,000.00 even.

Q. Six thousand in all for those two?

A. That is right.

Mr. Renfrew: No objection.

The Court: They may be admitted.

Mr. Boochever: I believe these could be fixed together and made one exhibit as they are now.

Clerk of Court: Plaintiffs' Exhibit 13.

Q. Now, I introduced an exhibit there for the work done by the Fairbanks-Morse & Company. I believe it was about 7. It was one of the statements on yellow paper.

(Testimony of Almon E. Owens.)

Mr. Renfrew: That would be Exhibits 3 and 4.

Q. I believe it was later than that. It is Exhibit 6, which is for a statement for $4,306.25, and an additional statement of $1,778.94, which statements were in regard to labor and materials in regard to work done on the vessel Adak, machine work and materials, and in regard to that you testified that you paid those bills; is that correct?

A. That is correct.

Q. Do you have the checks for that?

A. I don't have the checks. They have been misplaced some place.

Q. You couldn't locate that? [30]

A. I couldn't locate that.

Q. Now, in addition to those bills that we introduced here did you have any of your own employees working on that vessel? A. We did.

Q. Whom did you have working on it?

A. Mr. Blanchard.

Q. And how long a period was he working on there?

A. He worked there three and a half months, approximately.

Q. And how much was he being paid?

A. Paid him four hundred dollars a month and board.

Q. And he was paid that that period of time?

A. That is correct.

Q. And what other men did you have working on the vessel at that time?

A. We had a Mr. Moore on there as a cook.

(Testimony of Almon E. Owens.)

Q. And in regard to Mr. Moore I show you what purports to be two checks made payable to him, and ask you if you can identify them?

A. I can.

Q. What are they?

A. Checks paid to Mr. Moore there for cooking on the vessel.

Q. And in what amounts are they, so we will have that in the record?

A. $232.57; $222.45. [31]

Mr. Renfrew: We object to these as immaterial and irrelevant.

The Court: That is for the payment of whose wages?

Mr. Boochever: Yes, your Honor.

The Court: Whose wages?

Mr. Boochever: Of Mr. Moore's wages, an employee of Owens', who was—I will ask him a few more questions if I may.

Q. Was Mr. Moore's employment on the vessel at that time connected with the repairs of the vessel in any way?

A. Cooking for the crew that was working on the boat.

Q. While they were repairing the boat?

A. That is correct.

Mr. Boochever: With that I request that this be introduced as Plaintiffs' Exhibit No. 14, these two checks as one exhibit.

The Court: Well, so far he has only testified to Mr. Blanchard working on the boat. Maybe he better testify who else was working on the boat.

(Testimony of Almon E. Owens.)

Q. Were there any other of your employees working on the boat? A. Yes, sir.

Q. Who were they?

A. Mr. Jacobsen; Mr. Eaton; I believe that was all.

Q. Was a Mr. Tucker working on the boat?

A. Yes; that is correct. Mr. Tucker was working on the boat [32] as well.

Q. And did you furnish them board on the boat as part of their contract of employment?

A. That is right.

Mr. Boochever: With that explanation, your Honor, I request that this be introduced as Plaintiffs' Exhibit No. 14.

Mr. Renfrew: Same objection, your Honor.

The Court: Objection overruled. It may be admitted.

(Whereupon, the exhibit was marked Plaintiffs' Exhibit No. 14.)

Q. Now, in regard to Mr. Tucker, whom you mentioned as one of the men working on the boat, I show you what purports to be three checks made payable to him, and ask you if you can identify them? A. I can.

Q. What are they?

A. They are three checks payable to Mr. Tucker, one in the amount of $292.90; the second one is the same amount; and the third one is $289.50.

Q. And what were those checks paid to him for?

A. For his work on the engine.

Mr. Renfrew: No objection.

(Testimony of Almon E. Owens.)

Mr. Boochever: I request that be introduced as Plaintiffs' Exhibit 15, your Honor, the three as one exhibit.

(Whereupon, the exhibit was admitted and marked [33] Plaintiffs' Exhibit No. 15.)

Q. You mentioned Mr. Eaton. I show you two checks that were purported to be made payable to W. E. Eaton, and ask you if you can identify them? A. I can.

Q. What are they?

A. They are checks made payable to Mr. Eaton for work done on the engine, one in the amount of $219.26 and the other one for $245.20.

Mr. Renfrew: No objection.

Mr. Boochever: I request they be introduced as Plaintiffs' Exhibit 16.

The Court: They may be admitted.

(Whereupon, the exhibit was marked Plaintiffs' Exhibit No. 16.)

Q. Now, you mentioned Mr. Jacobson working on the vessel, and I show you two checks purported to be made payable to him, and ask you if you can identify them? A. I can.

Q. What are they?

A. Two checks paid to Mr. Jacobson, one in the amount of $92.45 and the other one $172.50.

Q. And what were those paid to him for?

A. For his work on the boat there while it was being repaired. [34]

(Testimony of Almon E. Owens.)

Mr. Renfrew: No objection.

The Court: They may be admitted.

Mr. Boochever: That is No. 17.

(Whereupon, the exhibit was marked Plaintiffs' Exhibit No. 17.)

Q. Now, you mentioned Mr. Blanchard worked on the vessel. I show you one, two, three, four, five, six checks made payable to him and ask you if you can identify them? A. I can.

Q. What are they?

A. They are checks made payable to Mr. Blanchard for his work on the boat while it was being repaired.

Q. And what amount are they?

A. $78.63, $300.00, $69.00, $303.74, $333.40, and the last check is the same amount as that; two checks for $333.40.

Mr. Renfrew: Objected to as immaterial. He didn't say what his work was on the boat.

The Court: Well, he didn't specify.

Mr. Boochever: Possibly I should ask one more question to satisfy counsel.

Q. What work was Mr. Blanchard doing on the vessel?

A. Mr. Blanchard was assistant engineer and our representative there in the repair on the boat.

Mr. Boochever: I request that these checks be introduced in evidence. [35]

Mr. Renfrew: Same objection.

The Court: Well, I suppose the objection is

(Testimony of Almon E. Owens.)

based on the ground they aren't sufficiently identified with the position as testified to?

Mr. Renfrew: That is correct, your Honor.

The Court: Is there any way he can do that?

Q. Can you tell a little more in detail what Mr. Blanchard——

The Court: You don't have to say what Mr. Blanchard did, but what did these men, what work were they doing? Was it work that was necessitated by the condition you discovered the vessel in, or what? A. That is correct.

The Court: Objection overruled.

(Exhibit was marked Plaintiffs' Exhibit No. 18.)

(Whereupon, Court recessed until 2:00 o'clock p.m., March 8, 1951, reconvening as per recess, with all parties present as heretofore; the witness Almon E. Owens resumed the witness stand, and the direct examination by Mr. Boochever was continued as follows:)

Q. Mr. Owens, you were, I believe, when you left the stand you were discussing the amount you paid to your various employees working on the repair of this vessel. In addition to those amounts did you furnish them with board?

A. That is correct.

Q. And how much did you spend upon their board?

A. Something over seven hundred dollars. I forget the exact [36] amount.

(Testimony of Almon E. Owens.)

Q. It was over seven hundred dollars?

A. As I remember; yes.

Q. And you know that it was over seven hundred dollars, but you don't remember the exact amount; is that correct? A. Yes.

Q. Now, moreover, did you pay any additional amounts on that in regard to your traveling back and forth?

A. That is correct. I made four trips to Seattle.

Q. Possibly this letter may refresh your memory on the amounts you spent in that regard, and I would like to know just how much you spent on those trips.

A. The first trip was on the 7th of May, and I came back on the 12th, and I spent $174.60 on plane fare and $49.30 for hotel and meals. The next trip was on the 4th of June, and I came back on the 8th. My plane fare was the same amount, $174.60; and $34.00 for hotel and meals. Then the next trip was on the 5th of July, and I stayed down until the 12th. The plane fare was the same amount. I spent $59.60 for hotel and meals. The next and last trip was on the 20th of July, and I came back on the 31st. That amounted, the plane fare was the same amount, and I spent $93.50 for hotel and meals.

The Court: What is the total?

A. A total of $934.80. [37]

The Court: Now, will you just state why you had to make those trips?

(Testimony of Almon E. Owens.)

A. These various things would come up in regard to the boat.

The Court: Well, the trips were made exclusively in connection with this business?

A. That is correct.

Q. You had no other reason for going down to Seattle on those trips? A. I did not.

Q. Now, Mr. Owens, did you also make any other payment in regard to parts and supplies for the boat?

A. Yes. We paid Mr. Blanchard for supplies and parts that he bought for the boat while he was on there.

Q. I will show you what purports to be a check made payable to Mr. Blanchard, and ask if you can identify that? A. That is right.

Q. What is that?

A. A check for $1,678.02 that we paid Mr. Blanchard for supplies and parts that he bought for the boat while he was on it.

Q. Was that during the same period of time that he purchased those parts and supplies?

A. That is correct.

Mr. Renfrew: We object to the introduction of this in evidence on the ground that there is no showing made that [38] it had any connection whatsoever with any damage to the boat.

The Court: I think he should show that they were used to repair the boat because of the condition in which it was found as your testimony shows.

Q. Do you know what these sums were spent for by Mr. Blanchard?

(Testimony of Almon E. Owens.)

A. Mr. Blanchard furnished me a detailed account, but I don't have that.

Q. Do you know what they were?

A. No; I don't remember those.

Q. Were they all for the repair of the boat, or some for ship's supplies?

A. I think there was some for ship's supplies, but I don't know.

Q. You don't know what part? A. No.

Mr. Boochever: I would like this introduced for identification then, and I will renew my request after Mr. Blanchard testifies, your Honor.

The Court: It may be marked for identification.

Clerk of Court: Plaintiffs' Exhibit 19 for identification.

Q. Now, Mr. Owens, when you ascertained that it was going to be necessary to get a new crankshaft and that these extensive repairs would have to be done to the forepart of the [39] boat, did you notify Mr. Anderson and make demand upon him?

A. That is true. We had our attorney in Seattle notify him and make demand.

Q. And did Mr. Anderson ever reply to that notification? A. That is correct.

Q. Did he write you a letter? A. Yes, sir.

Q. I show you what purports to be a letter signed by Jack C. Anderson, dated June 11, 1947, and ask you if you can identify that?

A. I can.

Q. What is that?

A. That is a letter from Mr. Anderson.

(Testimony of Almon E. Owens.)

Mr. Renfrew: No objection.

The Court: It may be admitted and marked.

Mr. Boochever: Plaintiffs' Exhibit 20.

(Whereupon, the exhibit was marked Plaintiffs' Exhibit No. 20.)

PLAINTIFFS' EXHIBIT No. 20

June 11, 1947,
Seldovia, Alaska.

Mr. A. E. Owens,
c/o Columbia Lumber Company,
Juneau, Alaska.

Dear Mr. Owens:

We planned on stopping in to see you, but due to the delay in the shipyard and therefore late in getting loaded, we went straight out from Queen Charollette Sound to Cook Inlet.

Our main reason for wanting to see you was to talk over the difficulties you are having with the tug. We had a letter from Mr. Mills stating that we misrepresented and induced you to purchase the TP-100, which no doubt you know we never did. As you remember the other transaction with the Canadian firm was about to be completed when you insisted on purchasing the boat as she was. You inspected her several times. So we do not feel responsible under the circumstances, as the Canadian firm would of purchased her as is where is, the day you completed the deal. We put our cards on the

(Testimony of Almon E. Owens.)

table and felt that there was nothing we hid from you. You know as well as we do that when you get the boat fixed up it will be well worth the money you have invested.

We are very sorry to hear of the great expense you had to go through in order to put the tug in shipshape. Now as to the forefoot of the boat it was impossible for anyone to determine the extent of the damage before the tug was hauled out. However, we told you the forefoot was damaged. Now next is the crankshaft, that's approximately the same story again. As to the extent of damage to the crankshaft we couldn't say. We told you the crankshaft had been scored and we had hung up one piston and it was running on five cylinders. From your conversation with us you informed us you could purchase a crankshaft for the same motor.

Trusting that you will get much pleasure and prosperity from the boat after it starts work, and that you will feel differently towards the whole thing, I remain,

Sincerely,

/s/ JACK C. ANDERSON.

JCA/la

Admitted in evidence March 8, 1951.

(Testimony of Almon E. Owens.)

Mr. Boochever: Now, at this time, your Honor, I would like the witness to read this letter because there are several points in it, or I can read it, that I think I would like to have explained by him.

The Court: Well, if it is necessary to make intelligible what follows, you may read it. [40]

Mr. Boochever: The letter is to Mr. A. E. Owens, care of Columbia Lumber Company, Juneau, Alaska, dated June 11, 1947, Seldovia, Alaska. "Dear Mr. Owens: We planned on stopping in to see you, but due to the delay in the shipyard and therefore late in getting loaded, we went straight out from Queen Charollette Sound to Cook Inlet.

"Our main reason for wanting to see you was to talk over the difficulties you are having with the tug. We had a letter from Mr. Mills stating that we misrepresented and induced you to purchase the TP-100, which no doubt you know we never did. As you remember the other transaction with the Canadian firm was about to be completed when you insisted on purchasing the boat as she was. You inspected her several times. So we do not feel responsible under the circumstances, as the Canadian firm would of purchased her as is where is, the day you completed the deal. We put our cards on the table and felt that there was nothing we hid from you. You know as well as we do that when you get the boat fixed up it will be well worth the money you have invested.

"We are very sorry to hear of the great expense

(Testimony of Almon E. Owens.)

you had to go through in order to put the tug in shipshape. Now as to the forefoot of the boat it was impossible for anyone to determine the extent of the damage before the tug was hauled out. However, we told you the forefoot was damaged. Now next is the crankshaft, that's approximately the same story again. [41] As to the extent of damage to the crankshaft we couldn't say. We told you the crankshaft had been scored and we had hung up one piston and it was running on five cylinders. From your conversation with us you informed us you could purchase a crankshaft for the same motor.

"Trusting that you will get much pleasure and prosperity from the boat after it starts work, and that you will feel differently towards the whole thing, I remain, sincerely, Jack C. Anderson."

Q. Now, Mr. Owens, with reference to this letter, first of all he states in here that he didn't misrepresent the vessel to you. Is that statement a true statement? A. That is not true.

Q. In what way, if any, did he misrepresent the vessel to you?

A. He misrepresented the vessel to us in the extent that he told us it would be less than five thousand dollars to put the vessel in first class condition. That was the representation I bought the boat on.

Mr. Renfrew: Your Honor, I object to this testimony as being repetitious. The witness testified to this this morning.

(Testimony of Almon E. Owens.)

The Court: I am inclined to think it has been testified to.

Mr. Boochever: Well, your Honor, I want to go into [42] each of the items that are mentioned here.

The Court: You mean you are just calling his attention to it?

Mr. Boochever: Yes, your Honor, and see whether he has any comment to make on each of them.

The Court: Objection overruled.

Q. Now, were there misrepresentations in regard to specific things wrong with the boat?

A. That is true.

Q. And in what way were they misrepresented?

A. In regard to the engine, that the only thing the engine needed was one bearing or crankshaft bearing to be re-turned, and that the only thing the bow needed was the smoothing up of the forefoot.

Q. And, now, he states that you purchased the vessel as it was where is; is that correct or not?

A. That is not true.

Q. How did you purchase the vessel?

A. We purchased the vessel for twenty-five thousand dollars with the definite understanding that the repairs would cost less than five thousand dollars.

Q. And was there a definite understanding as to what the condition of the vessel was?

A. That is true.

Q. What was that understanding? [43]

(Testimony of Almon E. Owens.)

A. That it was in first-class condition with these two exceptions.

Q. The two exceptions which you previously mentioned? A. That is correct.

Q. He says, "From your conversation with us you informed us you could purchase a crankshaft for the same motor." Was there anything of that nature said by you? A. No, sir.

Q. Could you have purchased a crankshaft? Did you know of any at the time you negotiated the arrangement for the sale of the boat?

A. No, sir.

Q. It was only afterwards that you went in to get a new crankshaft; is that correct?

A. Sometime afterwards.

Q. After you ascertained the damage?

A. That is correct.

Q. Now, Mr. Owens, how long did it take to repair that vessel?

A. Approximately three and a half months.

Q. About how many days was it?

A. I think about one hundred and five days, as I remember it.

Q. And do you know how long it would have taken you to repair the vessel had it been in the condition that was represented to you when you purchased it? [44]

A. Considerably less than thirty days.

Q. Then that would leave approximately seventy-five days at least that you were deprived of the use of the vessel; is that correct?

(Testimony of Almon E. Owens.)

A. That is right.

Q. Now, what use could you have made of the vessel during that period of time?

A. We could have had it towing logs all the time.

Q. Did you inform Mr. Anderson when you originally negotiated the purchase of the vessel just what you wanted the vessel for?

A. That is right.

Q. What did you tell him in that regard?

A. That we were logging and wanted it to tow logs.

Q. And during this period of seventy-five days, which would have been during the period of June, July, and a portion of May, and a little bit of August, of 1947, did you have logs available to tow?

A. We put in something like seven million feet ourselves and had about five and a half million feet that we could have delivered.

Q. And where did you have those logs?

A. They were in Menefee Inlet, which is in the Ketchikan district, and in Frosty Bay.

Q. And where would you have delivered [45] them? A. Sitka.

Q. Now, in regard to that, did someone else do the delivery of those logs?

A. Practically all of them; yes.

Q. And do you know what they charged for the delivery of them?

A. I think four dollars a thousand——

(Testimony of Almon E. Owens.)

Mr. Renfrew: Your Honor, I object to this as hearsay and not the best evidence.

The Court: Well, he is asking him if he knows what they paid. That sounds like it ought to be based on personal knowledge.

Mr. Renfrew: He said did he know that somebody else delivered them and did he know what they got for them. That is not the best evidence, your Honor.

The Court: I didn't understand the question to be in that form.

Q. Do you know what was paid for delivery of those logs?

A. Four dollars a thousand for all of the logs delivered.

Q. And, if you had had the use of the boat, what price could you have obtained for delivering those logs?

A. The same price, four dollars a thousand.

Q. And approximately what portion of that price would have been profit?

A. About fifty per cent. [46]

Q. And how many logs could you have delivered in that period of time?

A. Approximately five and a half million feet.

Q. And that would come to about how much profit that you lost?

A. About eleven thousand dollars.

Q. Now, before you ascertained all this damage to the vessel but after you purchased the vessel, did

(Testimony of Almon E. Owens.)

you have any conversation with Mr. Anderson in regard to a lifeboat?

A. Mr. Anderson came to me and said he had a power barge there that he was trying to get a license to come to Alaska with and that he was unable to find a lifeboat there in Seattle and asked us if he couldn't borrow one of the boats off of the Adak to use on the way north and that he would stop at our camp and deliver the boat there as he came through.

Q. Where was your camp?

A. That was in Menefee Inlet at that time.

Q. And is that where it was agreed that the lifeboat would be returned? A. That is correct.

Q. And did you agree to loan the lifeboat on those conditions? A. I did.

Q. Can you describe the lifeboat?

A. It was a steel lifeboat; I should imagine, about twenty [47] feet long.

Q. What was its condition?

A. It was in first-class condition.

Q. Was it equipped?

A. It was equipped.

Q. Did it have oars? A. It had oars.

Q. Now, was that lifeboat ever returned to you?

A. It was not.

Q. And did you ever have any accounting from Mr. Anderson where that lifeboat is or was?

A. No, sir.

Q. And did you check it when you went north to find out if it was at Menefee Inlet?

(Testimony of Almon E. Owens.)

A. It wasn't there when I came north.

Q. And you never have received that lifeboat to this day? A. No.

Q. What is the fair market value of that lifeboat? A. About one thousand dollars.

Q. You stated that when you originally had this conversation that Mr. Anderson stated that the forefoot was slightly bruised. Did he state how it happened?

A. He said it struck a log on the way south.

Q. Have you subsequently had occasion to look at the logbook of the vessel TP 100? [48]

A. That is correct.

Q. I show you what purports to be a logbook and on the outside is "M./S. Helen A," and ask you if you can identify this book? A. I can.

Q. What is that?

A. The logbook of the TP 100.

Q. And do you know why "M./S. Helen A." was on it?

A. That was their name for it, but it was never documented.

Q. I will ask you to read the entry of February 14——

Mr. Renfrew: I object until it is first offered in evidence and admitted.

The Court: Unless it is entirely preliminary——

Mr. Boochever: I think the objection is well taken. I want to offer this particular portion of the logbook with reference to the entry over here.

(Testimony of Almon E. Owens.)

Mr. Renfrew: You are just offering this particular portion of the log?

Mr. Boochever: That is all.

Mr. Renfrew: No objection.

The Court: It may be admitted.

Mr. Boochever: This page, these two pages of the logbook are what we are offering in evidence. I guess you will have to include the whole book, but that is the only portion that we feel is [49] relevant.

Clerk of Court: Plaintiffs' Exhibit 21.

Q. I will ask you to read the entry under "Weather and Remarks" of the date of February 13 or February 14, 1947.

A. The item is marked under date of February 11, I believe; no; February 13 at 9:25 a.m., marked at Couverden; and in the "Weather and Remarks" column it says, "Struck rock. Backed off. Under way. Done some damage to forefoot and stem."

Q. Now, did Mr. Anderson inform you that they had struck a rock on the way down with the vessel? A. He did not.

Q. What did he inform you in that regard?

A. That he struck a log on the way down.

Mr. Renfrew: I object. He has answered that two or three times.

The Court: It is repetition.

Mr. Boochever: That is all, your Honor.

(Testimony of Almon E. Owens.)

Cross-Examination

By Mr. Renfrew:

Q. Mr. Owens, I understand that your business is that of logging and contracting, is it?

A. That is right.

Q. And how long have you been engaged in that type of business? [50]

A. Practically all my life.

Q. By that I suppose you mean the past years of your majority anyway?

A. Yes. I would say for many years at least.

Q. And you have been in and around boats considerable, have you? A. That is right.

Q. And this isn't the first boat you ever owned then, I take it? A. No, sir.

Q. And you have bought other boats and vessels? A. Yes, sir.

Q. And now, when you first talked with Captain Anderson or the first time you met him was in Seattle when you heard he had this Army boat for sale; is that right? A. That is correct.

Q. And you understood he bought that boat at Army surplus? A. Well, I think so; yes.

Q. And you knew a little of the history about the boat after you discussed it with him before you agreed to buy it? A. No, I didn't.

Q. Didn't you determine that he had been using the boat in Alaska since he had purchased it?

A. I understand he had been using it; yes.

Q. And, as a matter of fact, when you looked

(Testimony of Almon E. Owens.)

the boat over, [51] there were some men there from a Canadian outfit looking the boat over at the same time, were there not? A. No, sir.

Q. Do you deny, Mr. Owens, at the time you looked at the engine that there was a mechanic there representing the Pacific Coyle Navigation Company with a micrometer miking the crankshaft where the scored bearing was?

A. There was nobody there to my knowledge.

Q. Now, Captain Anderson took you and showed you all over this boat, didn't he?

A. That is right.

Q. And the engine plate was off where this particular piston was hung up, wasn't it?

A. That is right.

Q. And Captain Anderson explained to you that he had been running that vessel for a considerable period of time on five cylinders with this particular connecting rod detached from the crankshaft, didn't he? A. That is right.

Q. And now, when Mr. Anderson first offered this boat for sale to you, what was the price?

A. Twenty-five thousand dollars for us to do the repair work as he specified, or he would do the work himself for thirty thousand dollars.

Q. Well, at first he said, "I will fix the boat up and you [52] can buy it for thirty thousand dollars, or if you want to take it and you fix it up it will be twenty-five thousand," isn't that right?

A. I think that is correct.

(Testimony of Almon E. Owens.)

Q. So you bought it for twenty-five thousand dollars?

A. That is correct, with certain representations from Mr. Anderson.

Q. All right. Now, you had had considerable experience with boats before. Did you make any effort to look the boat over?

A. I have already specified there was no way to see under the water in Lake Union and, as far as the engine was concerned, I couldn't take it down. There was no way to know about it except what he told me.

Q. Well, did you ask Captain Anderson when the boat had been out of the water the last time?

A. That I don't remember.

Q. Ordinarily wouldn't you ask him whether or not the boat had been in dry dock or if he had ever seen the hull?

A. Possibly. I don't remember.

Q. Well, now, Mr. Owens, you were going to spend twenty-five thousand or thirty thousand dollars. Don't you recall whether you questioned him about what condition the hull was in and how he knew it? A. I don't remember. [53]

Q. You don't remember. And now, do you remember Captain Anderson suggesting to you a way of getting the crankshaft out of the boat?

A. No, sir.

Q. Now, let me help you a little bit. Do you recall Captain Anderson telling you how the crankshaft had to be removed from either that boat or

(Testimony of Almon E. Owens.)

a similar boat in Alaska, that they found that by removing the stack on the deck and taking it out the front way it simplified it, oh, more than one hundred per cent; there was nothing to taking it out that way? A. I don't remember that.

Q. You don't remember that description?

A. No.

Q. You don't recall that at all?

A. I don't recall it.

Q. Now, had you been looking at other boats in the vicinity at the time?

A. I looked at several of them.

Q. And did you know that the Canadian people that I mentioned here, the Pacific Coyle, were interested in buying this boat?

A. All I knew was what Mr. Anderson told me.

Q. Well, did you know that then, the substance of what I stated? [54]

A. I know that he told me that he was negotiating with some Canadian people. That is all I know. I didn't meet them. I didn't see them or know anything about it.

Q. Well, weren't you present when Captain Anderson received a telephone call in which the people told Captain Anderson they wanted to buy the boat and that he turned around to you and said, "Now, Mr. Owens, I can sell it right now, and do you want it or don't you want it," and you said, "Tell him the boat is sold, and I will put the five thousand dollars in the bank for you today"? Do you recall such a conversation?

(Testimony of Almon E. Owens.)

A. I recall he talked on the telephone, but I don't know what was said to him on the telephone.

Q. Well, I am not talking about what was said to him on the telephone. I am talking about what he said to you. Did he not, while he was talking on the telephone, turn to you and say, "Mr. Owen, the Canadian people want to buy this boat now and, if you want it, all right; if you don't, say so," and did you not at that time say to him, "All right; it is a deal. I will put the five thousand dollars in the bank for you. Tell them it is sold."

A. I would say my memory is a little hazy on what transpired at that time.

Q. All right. If your memory is hazy, we will let it go. Now, did you talk with anyone else in Seattle prior to [55] the time you purchased this vessel, the TP 100, now known as the Adak, about the condition it was in?

A. I don't know that I did.

Q. To refresh your memory, didn't another man attempt to sell you a boat and tell you that he knew the condition of the TP 100 and that the crankshaft was absolutely no good in it and would have to be removed?

A. I have no knowledge of anything of that kind.

Q. You don't have any knowledge of it?

A. No, sir.

Q. All right. I will ask you whether or not a man from the——

(Testimony of Almon E. Owens.)

Mr. Renfrew: Just a minute, your Honor, until I get the correct name.

Q. Do you know Mr. A. W. Dawe from New Westminster? A. I don't think I do.

Q. Well, do you know Mr. Oaksmith?

A. Yes. I know two or three Oaksmiths.

Q. Well, do you know this one?

Mr. Renfrew: Stand up, Mr. Oaksmith.

Q. This gentleman standing here?

A. Yes, sir.

Q. Well, now, did Mr. A. W. Dawe and Mr. Oaksmith talk with you prior to the time that you bought the TP 100? A. No, sir.

Q. Do you deny that you had a conversation with them in [56] Seattle?

A. I don't remember that.

Q. Just a minute until I finish the question, sir. Do you deny that you had a conversation with them in Seattle previous to the time that you purchased the TP 100 in which they told you that the TP 100 crankshaft was flat and would have to be removed and that the boat was in bad shape and that they tried to sell you a boat they had? Do you deny that?

A. I have no knowledge of that at this time.

Q. You mean you can't recall it or you deny it?

A. I can't recall it.

Q. Do you likewise deny that you stated to them, "Gentlemen, it is all a matter of terms with me. I haven't the cash. Therefore, I have to buy the

(Testimony of Almon E. Owens.)

TP 100 because I can buy it on good terms''? Do you deny that conversation?

A. I have no reason to deny it. I don't know that the thing happened at all.

Q. Well, Mr. Owens, there is nothing wrong with your memory that you know of?

A. This is four years ago. Some things I have reason to remember, and others I don't.

Q. Well, do you mean to tell me that all the experience and difficulty that you had with this boat, that you would not remember such a conversation if it took place? [57]

A. I don't remember that it took place.

Q. Well, Mr. Owens, did you have a competent surveyor representing you on the purchase or the repairs of this TP 100?

A. On the repairs, yes.

Q. Who?

A. On the repairs on the engine we had the Fairbanks-Morse people do it. They put their best man on it.

Q. Well, wasn't that after you had someone else at first work on the bearing, like you testified to this morning? A. You mean when we——

Q. Just answer the question. Either it was or it wasn't.

A. I would like to answer it my own way, and that is——

Q. Well, you can explain it afterwards, but first will you answer my question? Before you had the Fairbanks-Morse engineer, did you not have someone else attempt to repair the damage?

(Testimony of Almon E. Owens.)

A. We had the damage repaired that was represented to us that was all that was necessary to put the engine in good shape.

Q. All right. Now, did you have the boat surveyed prior to that time? A. No, sir.

Q. You mean then that after you had it repaired, the damage that you could see, that then you had the Fairbanks-Morse people in; is that right?

A. That is right. [58]

Q. Now, it is customary practice before you start fixing one portion of an engine to call in an engineer or a surveyor and have him check it over so that they wouldn't be duplicating the work?

A. I would say that this time we did the work that was represented to us to be all that was necessary to do.

Q. Well, Mr. Anderson at no time told you it was a new boat, did he? A. No, sir.

Q. Did you examine the logbook prior to the time you purchased the boat? A. No, sir.

Q. How many days did you take looking that boat over, anyway?

A. I was there several times.

Q. You had ample opportunity, didn't you?

A. For all I could see, yes.

Q. Well, I will ask you, isn't it common practice on boats of that age to find tail shafts oxidized by galvanic action?

A. Yes; I think that is true.

Q. So that it was no surprise to you to find that condition existed?

(Testimony of Almon E. Owens.)

A. It was a surprise to me that the insurance company said it would have to be renewed before they would allow insurance on it. [59]

Q. All right. But as a man who had experience with boats, you knew how old that boat was and you know when those boats were made, don't you?

A. That is true.

Q. So, you knew how old it was? They were all built about the same time, weren't they?

A. It was only three years old at that time.

Q. That is right. And now, it is frequently common that a boat three years old would have its tail shaft oxidized by galvanic action in that length of time; wouldn't it?

A. It would be possible, but I wouldn't expect it.

Q. Well, but you didn't look for it, did you?

A. I couldn't see it if I looked for it.

Q. And so you bought it without looking for it?

A. I bought it as represented.

Q. Now, you admitted, however, did you not, Mr. Owens, that you never at any time questioned Captain Anderson as to whether the vessel had ever been out of water from the time that he purchased it? A. That I don't remember.

Q. Well, now, didn't you know how Jack Anderson purchased that boat?

A. I didn't know at that time.

Q. Well, did you know before you agreed to buy it? A. No. [60]

Q. Well, now I want to call your attention to Plaintiffs' Exhibit No. 1. Plaintiffs' Exhibit No. 1

(Testimony of Almon E. Owens.)

is the agreement, Mr. Owens, that you executed with Captain Anderson for the purchase of the boat, and it is dated the first day of April, 1947. Now, the first paragraph in the agreement under "Witnesseth" says, "That whereas first parties have purchased from the War Surplus Agency, Fort Richardson, Anchorage, Alaska, one TP 100 Army Tug and passenger boat for which first parties presently hold delivery certificate and which boat is presently located at the A. R. B. Packing Company dock, Lake Union, Seattle, Washington." Now, certainly you knew at that time that Captain Anderson had purchased this boat from the Army Surplus at Fort Richardson, didn't you?

A. That is true.

Q. You knew that he didn't even have a bill of sale from the Army Surplus when you bought it; isn't that right?

A. I wouldn't say that it wasn't or that it was. I didn't know whether he had a bill of sale or not at that time.

Q. Well, calling your attention to paragraph designated as number "(2)." "It is understood and agreed that the sale of said boat shall be effected at the earliest possible date and as soon as the First Parties have procured a due and legal bill of sale covering said boat and the documentation thereof, unless it is possible that the [61] documentation may be procured through the Second Parties in which event the sale shall be effected as soon as the bill of sale has been procured by the

(Testimony of Almon E. Owens.)

First Parties." Now, does that refresh your recollection? A. That is correct.

Q. And you knew that he didn't have a bill of sale from the Army and that the boat wasn't even documented as a civilian craft?

A. He had some sort of a bill of sale, not a regular bill of sale. He had some sort of paper at the time we bought the boat.

Q. He had a receipt for his money; that is all he had; the boat wasn't even documented through the Customs?

A. And it wasn't documented when we bought it, either.

Q. No; and that is the reason that you couldn't make the full payment. You didn't give him the five thousand dollars at the time you entered into this agreement on April 1st; you put it in escrow, didn't you? A. I believe that is right.

Q. And how long was it before you got the title to the boat so that that five thousand dollars was delivered to Jack Anderson?

A. I don't remember the time.

Mr. Renfrew: May I have just a moment, your Honor, to check? [62]

Q. You took possession of the vessel on April 1, 1947; isn't that true?

A. I believe that is right.

Q. And how did you get possession of it?

A. What do you mean by that?

Q. When you bought the boat she was laying at the Olson & Wing—was that the name of the firm?

(Testimony of Almon E. Owens.)

A. I imagine that is right.

Q. Well, do you know? I don't know, Mr. Owens.

A. I don't know. It was some yard in Ballard. That is all I know.

Q. It was Olson & Wing Shipyard; and then did you not request Captain Anderson to remove the vessel from there to some other shipyard that you wanted to take it to?

A. I believe it is right.

Q. Well, is it right?

A. I said I believe it to be right.

Q. Was that done at your request?

A. Yes, sir.

Q. Did you go along? A. Yes, sir.

Q. And you were on the vessel when she was taken under its own power from the place you purchased it to where you wanted it taken?

A. That is right. [63]

Q. And how long a trip is that?

A. A couple, three miles.

Q. Did you have an opportunity at that time to observe the operation of it?

A. To a certain extent; yes.

Q. You could have seen if it was leaking?

A. As far as it was evident; yes.

Q. And you could listen to the engine run?

A. It was a very slow bell.

Q. Well, did you ask him to rev it up?

A. He couldn't rev it up there because it was not allowed in those waters.

(Testimony of Almon E. Owens.)

Q. Did you ask that it be taken out in some other waters? A. No, sir.

Q. Now, I will ask you whether or not that was on the first day of April that was done, 1947?

A. I don't remember the date. It was sometime in April. I believe you are right.

Q. Well, now, wasn't it on the 20th day of May before you received the documentary papers and turned the five thousand dollars over to Captain Anderson? A. I don't remember the date.

Q. Well, it wouldn't have been before you got the documentary papers, would it, because that is the very essence of your agreement; isn't that true? [64]

A. I wouldn't know. That is handled by my attorney, and I don't know if I was personally there.

Q. But your attorney held the five thousand dollars; Anderson didn't have it, nor no bank had it; your attorney had the five thousand dollars?

A. That is probably true.

Q. And from the first day of April until the date that you got the title to the boat, the boat was in your possession and your money was in the possession of your lawyer; isn't that true?

A. That is right.

Q. Now, I hand you a copy of what purports to be the application of the owner for the official number, and I ask you if you can remember executing that document, the original of that, on or about the 20th day of May, 1947?

(Testimony of Almon E. Owens.)

Mr. Boochever: May we see that?

Mr. Renfrew: Yes; sure.

A. I think that is all right.

Q. Is that correct? A. I think so.

Q. Now, then from the first day of April until the 20th day of May, before you paid anything on this vessel, it was always in your possession?

A. That is true.

Q. Now, when did you first make any claim upon Captain [65] Anderson for a purported misrepresentation? A. I don't have the date.

Q. Well, did you ever make such a claim?

A. I had my attorney make the demand.

Q. Well, don't you have the copies of the correspondence? A. Not here in my hand; no.

Q. Well, do your attorneys have it?

A. I think so; yes.

Q. Will you step off the stand? Maybe you can ask them to hand it to you.

Mr. Boochever: Your Honor, I don't think that is relevant, correspondence of attorneys.

Mr. Renfrew: Your Honor, he testified on direct examination this morning that he directed that a demand be made upon Captain Anderson, and I want to know when it was.

The Court: Well, if you want to demand the production of a letter he wrote to Anderson, the Court will so order.

Mr. Renfrew: That is what I asked, your Honor.

The Court: The demand should be produced.

Mr. Boochever: Of course they have the original

(Testimony of Almon E. Owens.)

of it, your Honor. If they want the copy, I have it.

Mr. Renfrew: I want to know what you are relying on.

Mr. Boochever: We have a copy of a letter, dated May 17th, if that is what he wants. We didn't feel we could introduce it because it is our file copy is all. [66]

Q. Do you want to look through that, Mr. Owens? Did you ever see this letter that your attorney wrote?

A. Yes, I have seen this copy.

Q. You saw it before it was mailed?

A. No, I didn't see it before it was mailed.

Q. Can you tell me from looking at that whether or not that was the copy that you saw?

A. Yes, I saw this same copy.

Q. And what is the date on it?

A. The 17th of May.

Q. Then would that be the first demand that was ever made on Captain Anderson?

A. To my knowledge that is true.

Q. Then you had had the boat all of the month of April and up until the 17th of May before you made any claim whatsoever; isn't that true?

A. I believe we had to know what the situation was before we could make any claims.

Q. I just asked you a question. You had the boat from the first of April until the 17th of May without making any claim?

A. I think that is right.

(Testimony of Almon E. Owens.)

Q. And likewise you had the money all that period of time; no money had gone over to Captain Anderson; that is true, isn't it? [67]

A. We have answered that two or three times, haven't we?

Q. Well, answer it again. A. Yes.

Q. All right.

Mr. Renfrew: Now, your Honor, I wish to offer this application of the owner for an official number which Mr. Owens has testified to be a copy of the original. You gentlemen have seen it. Do you object?

Mr. Boochever: What is it?

Mr. Renfrew: The application.

Mr. Boochever: I don't see any relevancy, your Honor. I object on that ground.

Mr. Renfrew: The offer is made for the purpose of showing the date Mr. Owens testified he let go of the five thousand dollars and got the title to the boat.

Mr. Boochever: Your Honor, I don't believe the instrument which is offered shows that because it is an application for a number for the boat. It isn't a bill of sale of the boat.

The Court: I think what he contends is that the instrument in connection with his testimony shows it.

Mr. Renfrew: That is right. He testified he did it on that date.

The Court: Objection is overruled. It may be admitted. [68]

(Testimony of Almon E. Owens.)

The Clerk: Defendants' Exhibit A.

DEFENDANTS' EXHIBIT A

Customs Form 1320
Treasury Department

Application of Owner for Official Number
United States Customs Service

Place: Seattle, Washington
May 20, 1947.

To the Collector of Customs at Seattle, Wash.:

Sir: Application is hereby made, in accordance with the provisions of R.S. 4177, as amended (46 U.S.C. 45), and regulations established pursuant thereto, for an Official Number for the following-described vessel, which is ready for a marine document:

Name: Adak (formerly TP 100) of Ketchikan.
Rig: Oil screw.
Gross tonnage: 185.
Net tonnage: 116.
Register dimensions: Length, 90.8.
Breadth: 24.6.
Depth: 11.5.
Material of hull: Wood.
Hull No.: .....
Horsepower: 450.
Builder: Clyde W. Wood, Inc.

(Testimony of Almon E. Owens.)

Defendants' Exhibit A—(Continued)

When begun: June 14, 1943.
When launched: December 28, 1943.
When built: 1944.
Where built (place and State): Stockton Calif.
Type of engine: Internal combustion, 6 cylinders, 2 cycles, Diesel.
Engine built by Fairbanks, Morse & Co., at Beloit, Wisconsin, in 1944.
Owner: Owens Brothers, a co-partnership of A. E. Owens, Fern Owens and R. F. Owens.
Address (street, city, and State): Box 119, Ketchikan, Alaska.
Service: Towing.
Number of officers: 1. Crew: 3.

Application (is) (is not) made for award of visual Signal Letters. This vessel (is) (is not) equipped with radio-transmitting apparatus.

I Certify that this vessel has not previously borne an official number and has never been documented as a vessel of the United States under the above or any other name.

OWENS BROTHERS,

A Co-Partnership of A. E. Owens, Fern Owens, and R. F. Owens of Ketchikan, Alaska.

/s/ A. E. OWENS,
Capacity: Partner.
Port of Seattle, Washington.
May 21, 1947.

(Testimony of Almon E. Owens.)

Defendants' Exhibit A—(Continued)

To the Commissioner of Customs.

Sir: I transmit herewith the application for assignment of an Official Number for the vessel described above.

OSCAR W. DAM,
Deputy Collector of Customs.

In addition to the information to be given herein, the name or names of any former owner or owners shall be stated on the reverse hereof. If there was no former owner, that fact shall be stated.

This application shall be filed in duplicate when filed with the collector at the home port designated for the vessel; otherwise, in triplicate.

Customs Form 1319, Designation of Home Port of Vessel, must be executed in duplicate and accompany this application.

Former owner or owners:

U. S. War Department.
Jack Anderson, Jr.

Steam and Motor Vessels

For steam and motor vessels of 100 gross tons and over, the following additional information shall be given:

Cruising speed, 10 knots; full speed, 12 knots; cruising radius, 3,330 nautical miles.

(Testimony of Almon E. Owens.)

Defendants' Exhibit A—(Continued)

Fuel ordinarily used, if fitted for burning both coal and oil: Diesel oil.

Fuel capacity (fill in applicable spaces only):

Bunker coal (allow 42 cubic feet to ton of 2,240 pounds) ..... tons.

Bunker oil (231 cubic inches to gallon, or 1 cubic foot=7.48 gallons) 10,000 gallons.

Bunker gasoline (231 cubic inches to gallon, or 1 cubic foot=7.48 gallons) ..... gallons.

Daily consumption (24 hours) at cruising speed:

Coal ..... tons of 2,240 pounds.

Oil 720 gallons.

Gasoline ..... gallons.

Forepeak tank: Water.

Aftpeak tank: Fuel.

Side tanks: Fuel and Water.

Double bottom: No.

Draft: Loaded, 12 feet; in ballast, 11.5 feet.

Deadweight capacity, 80 tons of 2,240 pounds.

Passenger capacity: Cabin passengers, 11.

Other passengers: .....; Total 11.

Tankage capacity (exclusive of bunkers): no.

Refrigerator capacity: Number of chambers, no.

Radio set: Type, none.

Fill in appropriate spaces only for above-required data.

(Testimony of Almon E. Owens.)

Defendants' Exhibit A—(Continued)

I certify this to be a true copy of the original Application of Owner for Official Number on file in this office.

[Seal] /s/ OSCAR W. DAM,
Deputy Collector.

Custom House, Seattle, Wash., Feb. 27, 1951.

Admitted in evidence March 8, 1951.

Q. And now, Mr. Owens, you testified to some extent about some batteries to the tune of six hundred and some odd dollars. Did you examine the batteries on the boat before you bought it?

A. I didn't examine every battery to see what condition they were in; no.

Q. In all your experience on vessels you know that sometimes batteries go bad, and sometimes they don't. Did you ask him to try the batteries or turn the lights on or start the generator or anything?

A. No, I didn't do that.

Q. Well, did you inquire as to how old the batteries were? A. No.

Q. Well, when you inspected the boat, what did you do these several times you were down looking at it and making up your mind; what did you do?

A. I inspected the boat to the best of my ability; all I could see; you can't see into batteries.

Q. Well, did you try them?

A. The lights were on. There was no need to

(Testimony of Almon E. Owens.)

try them. As far as that is concerned, the lights were burning at that time.

Q. Well, did you ask Captain Anderson whether they were new batteries or whether those were the batteries that were on [69] the boat when he got it?

A. I didn't ask.

Q. Well, do you know how long a set of batteries in a boat of that type would last ordinarily?

A. No, I don't know that.

Q. You were spending twenty-five thousand to thirty thousand dollars of your money, Mr. Owens. Did you call upon a surveyor to make a check? Did you ask any expert advice if you didn't know yourself?

A. I asked Mr. Anderson the condition of the boat. He told me the condition of the boat, and that is what we bought it on.

Q. Where is this boat at present?

A. In British Columbia.

Q. Are you operating it? A. We sold it.

Q. When did you sell it?

Mr. Boochever: I object to that as irrelevant and incompetent.

Mr. Renfrew: Well, now, your Honor, it is not. It may develop that he sold this boat at three times the price that Jack Anderson got for it.

Mr. Boochever: That is completely irrelevant.

Mr. Renfrew: It might not be, your Honor.

The Court: Well, you ought to at least indicate how [70] it would be relevant before evidence of that kind should be admitted. I don't see that it is.

(Testimony of Almon E. Owens.)

Mr. Renfrew: Well, suppose he said he sold the boat right there? He claims that he lost all of this money by his recommendation that he lost a lot of time and one hundred dollars a day and eleven thousand dollars——

The Court: If he sold it right there or within a short time, it might be relevant.

Mr. Renfrew: Well, I will ask him.

Q. As a matter of fact, you sold that boat for sixty-five thousand dollars, didn't you?

Mr. Boochever: I object to that. It is irrelevant, incompetent and immaterial.

Mr. Renfrew: Well, are you afraid to let him answer it?

Mr. Boochever: I think it is immaterial, and I am not afraid of anything.

The Court: You will have to fix the time to show its relevancy on the matter of loss.

Mr. Renfrew: I am sorry, your Honor?

The Court: I said in order to show its relevancy you would have to show the time of the sale if it is a fairly short time or at least not too remote from the time of completion of repairs.

Mr. Renfrew: I would ask your Honor this: If the [71] man claims that he lost eleven thousand dollars by virtue of its non-operation and if he sold it within a reasonable time, or six months or a year after, at a tremendous profit, say twenty, thirty, forty, fifty thousand dollars, I feel it would be relevant.

The Court: Well, it would be relevant if you

(Testimony of Almon E. Owens.)

could show that he could have sold it at that price or some other price at the time that he claims he was deprived of its use. But after all the sale of something of the use of which you have been deprived, the ultimate sale price that he gets for it is irrelevant.

Q. I will ask you, when did you sell it?

A. I sold it just this winter.

Q. You mean 1951 or 1950?

A. Well, I believe it was 1951.

Q. Don't you know when you sold it?

A. I don't have the date in mind; no, sir.

Q. Maybe it will help you; you know enough about your income tax to know if you sold it in 1951, you won't have to worry about it for another year.

Mr. Boochever: I object to that. It is irrelevant.

Q. Was it sold in 1950 or 1951?

Mr. Boochever: I object to that, too. He said, "this winter."

The Court: I think it is too remote. [72]

Mr. Renfrew: Well, then maybe I can use it for the purpose of testing his recollection if he can't remember back two months.

The Court: Well, if you do that, you are bound by his answer no matter what it is.

Mr. Renfrew: Well, all right, your Honor.

Q. Now, your Exhibit No. 2, Mr. Owens, is a check to one Wilson. I understand they were a machine repair agency?

(Testimony of Almon E. Owens.)

A. They were the men recommended to me to do this turning or smoothing job on this crankshaft.

Q. Now, whether they were recommended to you or not, is that the agency that did do the repair?

A. That is correct.

Q. And is that where you had the boat taken by Anderson and Son, and yourself, right after you purchased it?

A. The boat was taken to the Stikine Fish Company Dock in Lake Union, and the work was done there, but not by them.

Q. It was taken from the place where you purchased it over to the Stikine Fish Company, and that is where the work was done, but not by the Stikine Fish Company; is that correct?

A. That is correct.

Q. And then the Wilson repair people came in there and did the work at that place?

A. That is correct. [73]

Q. And that cost three hundred dollars?

A. That is right.

Q. Now, just what did that work consist of?

A. Smoothing up the crankshaft.

Q. Where the one bearing had been disconnected and where that piston had been hung up?

A. Correct.

Q. And when they smoothed up that crankshaft and put the bearing back on, why then it would run on six cylinders instead of five?

A. It was never put back on.

Q. It wasn't put back on? A. No.

(Testimony of Almon E. Owens.)

Q. Why?

A. Because it developed that the balance of the main bearings on the crankshaft were also run, and the crankshaft in various places had been ground down as much as three-sixteenths of an inch in the bearing.

Q. How did you determine that?

A. By mikes.

Q. Who miked it?

A. Fairbanks-Morse's chief mechanic.

Q. All right. Now, do I understand then that, while you had Wilson make the repair and before you ever tried to run the engine again, you suddenly decided you better make a [74] complete inspection of the whole engine?

A. We did the work in the first place as recommended and instructed by Mr. Anderson. That proved not to be sufficient.

Q. Did you ever start that engine or hook up that cylinder after Wilson did the repair?

A. No, sir.

Q. Then how do you know that it was insufficient?

A. Because we took the caps off of the bearings and found out.

Q. Well, why did you take the caps off of the bearings, because you testified that Mr. Anderson told you it was in good shape; what did you take them off for?

A. Because we wanted to see, and we did see.

(Testimony of Almon E. Owens.)

Q. Didn't you take his word for it, that you testified, when you bought it?

A. We were advised by Fairbanks-Morse to go ahead and do this work, and they did it.

Q. You mean that Fairbanks-Morse out of the blue came out and said, "We know that there is something wrong with the engine in that machine"?

A. That is correct.

Q. Well, where did they get their information?

A. They got their information from the parts that they had been shipping to Mr. Anderson. [75]

Q. From the parts that they had been shipping to Mr. Anderson? A. Correct.

Q. Now, I suppose that you are prepared to back up that statement?

A. I believe I am; yes. I haven't got the man here to do it with. I can find the man that told me that. He told me that he would suggest that it was very, very advisable to go and inspect the rest of this crankshaft and find out what was the cause that he had been shipping so many of these parts to Mr. Anderson, that he hadn't done——

Q. And now, isn't it true that Mr. Oaksmith, the gentleman who you said you knew, that stood up here, isn't it true that he told you before you ever bought that boat that you couldn't tell by miking that crankshaft whether it was flat or not but that it had been throwing rods for months and months and months and that everybody knew it and probably the crankshaft was flat?

(Testimony of Almon E. Owens.)

A. No, that is not true. I haven't any memory of it at all.

Q. Now, who was it that you say told you that you should have the crankshaft——

A. I forget his name. It was the manager of Fairbanks-Morse Company at Seattle at that time.

Q. Did he just come to where the tug was and looked you up?

A. No, he didn't. I went into his office.

Q. Well, what caused you to go in there? [76]

A. Well, that is hard to say.

Q. You don't——

A. I don't remember why I went there but I went there, and during the conversation he told me that by all means before we took the boat out of Seattle to take off the rest of the bearings and inspect them.

Q. Well, as I understand it then, you are going directly upon what a repair agent talked you into having some repairs done after you had done the work that Captain Anderson, as you claim, told you to do. You didn't even try it, after you spent three hundred dollars with the Wilsons, at all?

A. No.

Q. And yet you rode on it across the lake, or wherever you took it there, and heard the engine running, didn't you? A. That is right.

Q. Well, where was the crankshaft taken out; right there at that same place?

A. Stikine Fish Company Dock.

Q. Is that where all the repairs were made?

(Testimony of Almon E. Owens.)

A. On the engine; yes.

Q. On the engine. Now, who took the engine out? Who took the crankshaft out?

A. Mr. Ted Engstrom was the man in charge there for Fairbanks, Morse & Company, and he had charge of taking the [77] crankshaft out and tearing the engine down and putting it back together again.

Q. And did he do that work under Fairbanks-Morse direction?

A. He was Fairbanks-Morse's head mechanic.

Q. Superintendent? A. That is correct.

Q. Did they take it out through the tail or did they pull the stack aside?

A. They pulled it out through the tail.

Q. Now, did they do the complete job?

A. Correct.

Q. And how long did it take them to do that?

A. I don't have the dates exactly; no.

Q. It would be included in that bill of Fairbanks-Morse, wouldn't it? A. That is right.

Mr. Renfrew: That is exhibit marked 3 and 4.

Mr. Boochever: Three and 4 is the crankshaft. Six is the work on it.

(Whereupon Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore; and the witness, Almon E. Owens, resumed the witness stand and the Cross-Examination by Mr. Renfrew was continued as follows:)

(Testimony of Almon E. Owens.)

Q. Do you recall—I think earlier today you testified that you had no recollection of Captain Anderson explaining to [78] you the taking of the crankshaft out by moving the stack instead of through the back there; do you have any recollection of that? A. No.

Q. Do you have any recollection of telling Captain Anderson that you could get a crankshaft in Juneau? A. No.

Q. When did you discover this crankshaft was bad and you would have to take it out?

A. After they took the bearings off and miked it and found that it was ground down in the bearings to the place where it would have to be returned.

Q. I want to know when that was.

A. I don't remember the date.

Q. The Fairbanks-Morse people did that?

A. Yes, sir.

Q. And you gave them authority to go ahead and fix up that crankshaft?

A. That is correct.

Q. Had you asked about what it would cost or anything? A. I don't believe I did.

Q. Were you interested in how much it was going to cost?

A. Certainly, but I wanted to get the boat in shape to run.

Q. Did you ask them how long it would take?

A. I don't think I did; no. [79]

(Testimony of Almon E. Owens.)

Q. You alleged in your complaint that you lost a lot of money by not being able to operate this vessel. Now, didn't you inquire then whether it was going to take thirty days or sixty days or ninety days in order to get it fixed and what it was going to cost? A. I don't remember that.

Q. You don't remember whether you did or not. Well, I want to call to your attention Plaintiffs' Exhibit No. 4, which is a bill from the Fairbanks-Morse people to Owens Brothers and the Adak, and it is for a builder's risk insurance policy; that would be for the insurance to cover them in case anything happened while they were fixing it; isn't that right? A. I suppose so.

Q. Well, now, that covers a period from April 29th to May 29th and from May 29th to June 29th, and that is the bill that you have presented here, so it must have been before April 29th that you discovered this damage? A. I think so; yes.

Q. That would follow, would it not?

A. I would think so; yes.

Q. You still had Mr. Anderson's money at that time, and you did have it up and until after the 20th of May. Now, why didn't you rescind the contract if you didn't want to go through with it? [80]

Mr. Boochever: I object to the question as stating a statement of counsel that he had that money until the 20th of May. I don't think it is in the evidence, and it shouldn't be part of the question.

Mr. Renfrew: Counsel raised the same objection

(Testimony of Almon E. Owens.)

before. He testified it was on the 20th of May, the date he made that application, that he got the bill of sale and that the money was turned over, and the application was put in evidence to illustrate his testimony about that time, and your Honor remembers it.

The Court: I think that is the testimony. Objection will be overruled.

Q. Now, why didn't you rescind your contract then? A. Because I wanted the boat.

Q. Anyway? A. I wanted the boat.

Q. Regardless of what it cost?

A. No, I wouldn't say that.

Q. You didn't even ask to find out?

A. I didn't say I didn't ask. I don't remember what I asked.

Q. Well, did you just figure, "Well, now, I have got Captain Anderson right where I want him, and it don't make any difference if it takes one month, two months, three months, six months or a year to fix that vessel, or what it costs. I am going to have it fixed even though I know before this [81] deal is consummated, and I am going to make him pay for it." Was that your attitude?

A. No, sir.

Q. Well, why didn't you then rescind your contract when you found out about this so-called hidden damage before you had ever paid him a nickle? Why didn't you rescind it at that time? Can you answer that, Mr. Owens?

A. I wanted to get the boat under way and get

(Testimony of Almon E. Owens.)

going. I had already spent a good deal of money on the boat.

Q. Well, now, what did you spend on the boat besides the three hundred dollars up to that point that you had paid Wilson Brothers; what had you spent besides——

A. I spent a lot of money on it.

Q. Well, what?

A. I don't have the figures right here.

Q. Don't give me the figures then. Just tell me for what you spent any money prior to the time that the Fairbanks people started to fix that engine. Now, as a matter of fact, Mr. Owens, you hadn't spent ten cents other than this repair which Wilson Brothers did to the tune of three hundred dollars, and you hadn't even tried the vessel up until the time you got Fairbanks-Morse in there to check the rest of the vessel, and three hundred dollars is all you obligated yourself for; isn't that true?

A. No, that isn't true. [82]

Q. Then tell me what else you had.

A. I had men on the boat there, working on the boat.

Q. Well, doing what?

A. Taking down this engine.

Q. Taking down the engine? Why, didn't you testify a moment ago that the Fairbanks-Morse people took down the engine, they had the entire charge of it, and did the work?

A. My men were working there at the same time.

(Testimony of Almon E. Owens.)

Q. Well, now, how many men did you have working there on the 24th of April?

A. That I wouldn't remember.

Q. You wouldn't start taking the engine down until Fairbanks-Morse told you that it had to be taken down, would you?

A. No. But I don't remember what date they started to do it.

Q. All right. Well, we know they started to do it before at least the 24th of April because that is the date of your insurance policy.

Mr. Boochever: The 29th, I believe.

Q. The 29th is correct. You can't claim that you had any men working on it and spent any money on it prior to that time of tearing it down?

A. I do, though.

Q. Well, for what? What were the men doing?

A. Working on this engine at that time. We had to start tearing this thing down before ever this insurance policy [83] was taken out.

Q. Do you mean you tore it down before Fairbanks-Morse told you to?

A. No. The Fairbanks-Morse man was there before this policy was taken out.

Q. Then you knew that the damage had occurred long before the insurance policy was written on the 29th of April; is that true?

A. I didn't write the insurance policy or have anything to do with it. I don't know a thing about when that was done.

Q. All right. Mr. Owens, the point I want to

(Testimony of Almon E. Owens.)

know is, before you discovered that this engine had to be torn down, what had you expended excepting the three hundred dollars to have the connecting rod honed out?

A. Up to that time probably nothing, but at the same time that was done before this insurance policy was taken out.

Q. All right. Then you knew about the damage even prior to the 29th of April because you had men work on it? A. That is true.

Q. Then why didn't you rescind the contract then?

A. I didn't want to rescind the contract.

Q. You wanted to go ahead without notifying Jack Anderson of how much it was going to cost or what you had run into and that you were going to hold him responsible?

A. I didn't know what it was going to cost. There was no way [84] to find out what it was going to cost.

Q. Well, you could have asked the Fairbanks-Morse people? A. They did not know.

Q. You mean they didn't know what it was going to cost to take that crankshaft out and rehone it or put a new one in?

A. Well, rehoning wouldn't have cost as much as a new one by any manner of means.

Q. Well, you didn't notify Jack Anderson until after you had started all that work and knew what you were getting into, and yet you had his money. Now, why didn't you?

(Testimony of Almon E. Owens.)

Mr. Boochever: I believe that question has been asked three or four times.

Mr. Renfrew: I know, but I haven't gotten an answer.

Mr. Boochever: I think he said he wanted the boat.

Mr. Renfrew: Well, we will withdraw that line of questioning for the time being, your Honor.

Q. Now, how many men did you have tearing down this engine?

A. I think at that time we had two men of our own.

Q. Two men of your own. Well, then how many men did Fairbanks-Morse have?

A. They had two.

Q. Am I to understand——

Mr. Renfrew: May I see those exhibits? Six, I think, is the important one.

Q. Now, am I to understand that there were four men working [85] on this engine at the same time? A. That is correct.

Q. Is that possible, Mr. Owens, for four men to be working on an engine?

A. I had them working there, and they were all busy.

Q. How long did the men that you had employed continue to work on the engine?

A. That I wouldn't remember.

Q. Was it just during the time the Fairbanks-Morse men were there, or did the Fairbanks-Morse men not complete the job?

(Testimony of Almon E. Owens.)

A. The Fairbanks-Morse completed the job with the help of our men.

Q. Then from the invoice that the Fairbanks-Morse give us we should be able to determine when the job was completed; isn't that right?

A. I believe so.

Q. And now, the job was completed in the month of July; isn't that true?

A. I think so. I don't have the figures in my head.

Q. I didn't understand you.

A. I say, I think so, but I don't have the figures in my head, the time that was done.

Q. Well, I will hand you Plaintiffs' Exhibit No. 6 and refer you to the second page there. Now, that is your last and [86] concluding statement from the Fairbanks-Morse people; is it not?

A. From this it would appear that it was sometime in July.

Q. Do you have some other bills for labor and material after July that you haven't put in here?

A. I don't know of any.

Q. All right. Then any work your men did would have to be done in the month of July, wouldn't it?

A. As far as the engine is concerned; yes, sir.

Q. Well, now, did they do some other work?

A. They worked on the front end of the boat when it was being repaired.

Q. And where was that being done?

(Testimony of Almon E. Owens.)

A. The yard in Ballard. I forget the name of the yard.

Q. And then after the engine was repaired at the location where that work was done, the boat was taken under its own power and moved, was it?

A. No, sir. It was moved; as soon as the crankshaft was taken out, it was moved. It was some time before we got the crankshaft back from the factory.

Q. I thought you bought a new crankshaft?

A. We did, but it took some time to get it from the factory.

Q. Oh, I see. You didn't mean when you said "back from the factory" that you sent it to the factory and got it back. I misunderstood you. [87]

A. I didn't mean that. I meant it was some time in getting the crankshaft from the factory.

Q. And where was the boat taken from the dock where the crankshaft was removed to have the work done on the forefoot and the keel and the bow?

A. It was taken to the yard at Ballard. I forget the name of the yard. The invoices will give you the name of the yard.

Q. Maybe your counsel will enlighten me on it.

Mr. Boochever: He said the invoices give it. I believe the name of it is Pacific Electrical and Mechanical Yard.

Mr. Renfrew: Is that Exhibits 9 and 10?

Mr. Boochever: Is that correct?

A. I think it is.

(Testimony of Almon E. Owens.)

Mr. Renfrew: May I see Exhibits 9 and 10, please?

Q. Now, I am looking at Plaintiffs' Exhibit No. 13, Mr. Owens, which is an invoice of the Pacific Electrical and Mechanical Company, Seattle 7, Washington, and is dated June 26, 1947, and this says, "To bill you for repairs to the Tug Adak (Helen A). Clean and copper paint bottom." Now, I take it that you had the whole bottom cleaned and copper painted?

A. While it was up there?

Q. While it was up there.

A. Yes, sir. [88]

Q. And you are including that in your bill that you are claiming against Captain Anderson?

A. That is included in the five thousand dollars.

Q. But he didn't tell you that the bottom had been cleaned and painted, and was copper painted, and that that could be done for five thousand dollars?

A. It could be done for much less than five thousand dollars.

Q. He said it could be?

A. I say it could be.

Q. Well, do you expect Captain Anderson to clean and paint and copper bottom the tug? Did he agree to do that?

A. That was included in the five thousand dollars and, if it was as he represented it, it wouldn't have been anything like the five thousand dollars.

Q. Now, I understand that you claim he told

(Testimony of Almon E. Owens.)

you that he would in these repairs not only do the repairs that were necessary but he was going to clean and paint and copper bottom the thing as well?

A. No. I didn't say anything of the kind.

Q. It is true, isn't it, that you are charging him for that job?

A. That job was done; yes, sir.

Q. By your workmen or by the people in the dockyard? A. By the people at the dockyard.

Q. Now, it says, "Repair forefoot." Who did that? [89] A. They did it.

Q. And "stem." Who did that?

A. They did it there at the yard.

Q. And the "keel." Who did that?

A. They did it there at the yard.

Q. And "Renew planks." Who did that?

A. They did the job there at the yard.

Q. Well, then what were your men doing at that time?

A. My men were working there with them at the yard at that time.

Q. Well, now, the yard billed you for the job. Were your men working for the yard at the time?

A. No, sir.

Q. You mean they were helping the men at the yard? A. That is correct.

Q. Did you have them on the pay roll in the capacity of deck hands or engineers or something on your vessel?

A. They were on the pay roll and being paid.

(Testimony of Almon E. Owens.)

Q. In what capacity?

A. Whatever had to be done there.

Q. Well, I understand, whatever had to be done. But let's take this man Moore. He was the cook?

A. He was the cook.

Q. Now, what was Blanchard? What was his capacity?

A. Blanchard was an assistant engineer and working on the [90] engine all the time it was being done, and he was in the capacity of our representative there on the job.

Q. Did he have authority to tell them what to do, and what not to do, and how to fix it, and o.k. it?

A. He had authority to o.k. it; yes, sir.

Q. Why was it necessary for you to make all these trips then?

A. Because he sent up for me to come down. He wanted some advice.

Q. He had the authority but he didn't want to exercise it; is that it?

A. I suppose that would be right.

Q. And now, what was Jackson, or Jacobson—maybe I am mispronouncing the name; that is the way I heard it—what was he hired as?

A. I believe he was hired as a deck hand to work around the boat.

Q. And Eaton?

A. Eaton was an engineer.

Q. And Tucker?

A. Tucker was an engineer.

(Testimony of Almon E. Owens.)

Q. Then you had two engineers, a supervising engineer, a cook and a deck hand?

A. At different times.

Q. At different times. But these men were helping over in the dockyards where the Pacific Electrical and Mechanical [91] Company were doing the work on the vessel; they were just helping them out?

A. They were doing the work that they were asked to do by the yard.

Q. Well, was that in connection with the repairs? A. That is true.

Q. I take it from your answer that the union doesn't have anything to do down there with these dockyard operations?

A. They didn't in this case.

Q. They didn't at all? A. No, sir.

Q. Were your men working by the hour or by the month?

A. Mostly by the month, I believe.

Q. Well, did you keep their time?

A. Yes, sir.

Q. And now, do I understand that this work was done while you were waiting for the crankshaft? A. I believe that is right.

Q. And then was the vessel taken back to the original moorage where the crankshaft was put in?

A. That is right.

Q. And then your men did whatever they were told to do by Fairbanks-Morse when they were putting the engine together? A. Correct.

(Testimony of Almon E. Owens.)

Q. And how many men did Fairbanks-Morse have working there [92] then?

A. They had two.

Q. Then did your three men at that time help them, or were there two?

A. As far as I know there was only two there at any one time.

Q. Well, the checks would show that anyway, I suppose? A. I think so.

Q. Well, where were you located when you had to make these trips down there? From where?

A. I was in Menefee Inlet.

Q. Where is that? In Alaska or British Columbia? A. In Alaska.

Q. How did you get word?

A. By radiophone or by letter.

Q. You had direct communication with radiophone to where? A. Ketchikan.

Q. Did you frequently talk back and forth to Ketchikan? A. Every day.

Q. How far were you from Ketchikan?

A. Perhaps a hundred miles.

Q. None of these questions Mr. Blanchard wanted you to come down on could have been answered by telephone or letter or radio?

A. I think not.

Q. What did you have to go down on? Can you remember some of [93] the things?

A. I had to go down. He sent for me to come down.

Q. The Fairbanks-Morse people were competent

(Testimony of Almon E. Owens.)

to take the engine out and put it in; there wasn't much you could do about that other than tell them to do it, was there, Mr. Owens?

A. Probably not.

Q. And isn't the same thing true of the ship's carpenters over at Ballard? They were doing the work on the hull. There wasn't very much you could do to tell them how to fix the hull. You took it over and——

A. Somebody has to be there to do that.

Q. You mean, to tell them to take it over there to do it; is that what you mean?

A. That is what I mean; yes, sir.

Q. Is that what you came down for? "Now you have the engine started; now we are going to have to fix the hull."

A. That wasn't the way it happened, though.

Q. What I am trying to find out, Mr. Owens, is why you had to make these four trips.

A. It was my boat, and I was seeing that it was taken care of and done properly.

Q. You had a man supervising, your chief engineer, and he was in charge, and the principal thing was to get the boat fixed, and you knew you were going to have to fix [94] the engine, and you knew you were going to have to fix the bow. Now, why did you make these particular trips down there, for what purpose? A. That I can't answer.

Q. All right.

Mr. Renfrew: May I see Exhibit 19, please? I believe this was merely offered for identification?

(Testimony of Almon E. Owens.)

Mr. Boochever: What one was it?

The Clerk: Nineteen was; yes.

Mr. Renfrew: I am sorry, your Honor. I overlooked that.

Q. Mr. Owens, did you ever at any time write a letter to Captain Anderson.

A. I wouldn't say whether I did or didn't.

Q. You have introduced in evidence a letter Captain Anderson wrote to you on June 11th in which he emphatically set forth that you knew that he sold you that vessel where is, as is, and that you bought it with that understanding. Did you ever answer that letter at all?

A. I don't remember that I did.

Mr. Renfrew: May I see Exhibits 14, 15, 16 and 17, please?

Q. Now, I understood you to state you had two men at a time working on your vessel?

A. As far as I remember, that is right. [95]

Q. Your Exhibits Nos. 14, 15, 16 and 17, Mr. Owens, include checks to H. B. Moore, C. R. Tucker, W. E. Eaton and R. F. Jacobson, and they are all dated July 8, 1947, and they run $232.57, $292.90, $219.26, $92.45. Now, is it true that those four men were working at that time on the boat?

A. The cook was on there all the time for the time the checks show. He would have been there whether the others were there or not.

Q. The checks would indicate you had all three besides the cook.

A. It might be. I wouldn't say it wasn't.

(Testimony of Almon E. Owens.)

Q. Do you know whether these men were actually working on the work being done by the Fairbanks-Morse people or ship's carpenters at Ballard, or were they doing other work on the vessel?

A. On the repair work.

Q. Don't you mean they were painting the vessel and cleaning it up and fixing this and fixing that?

A. No, sir.

Q. I have miscalculated here. I guess it is Exhibit 18 would be the other check. Yes; I see in Exhibit 18 you paid Mr. Blanchard on July 8th, $333.40. He must have been——

A. He was working all the time the boat was laid up.

Q. July 8th. Did you pay these men by the month? A. That is right. [96]

Q. Does this represent a month's salary?

A. That is correct.

Q. From June 8th to July 8th, on the date you listed. He worked that entire month on the vessel?

A. That is right.

Q. Whether the work was done by the drydock people or the work was done by the Fairbanks-Morse people? A. That is right.

Q. You had four men helping with the drydock crew and four men working with the Fairbanks-Morse people, whatever work was done during the month of June? A. That is right.

Q. Now, on July 31st, I see the same checks, so that would be for the month of July; the same condition is true all during that month; this crew

(Testimony of Almon E. Owens.)

of yours was helping the drydock company or the other company? A. That is right.

Q. Now, on April 18th, you have a check in here for Mr. Blanchard, $78.63; that would be for March?

A. I think that was for his fare down to Seattle.

Q. His fare to Seattle? A. I think so.

Q. Why do you expect Captain Anderson to be responsible for that? What connection could that have with Captain Anderson in any way? [97]

A. Getting a man down there to take care of this boat deal.

Q. You didn't even know on the 18th of April that anything would have to be done to the boat other than what you expected to do to it, did you? You didn't take possession of the boat until the first of April?

A. I had to have somebody on the boat, didn't I?

Q. Well, but you didn't expect Captain Anderson to pay for your having somebody on your boat, did you?

A. But he was on there doing this repair work.

Q. On the 18th of April you have him come down there. You want Captain Anderson to pay for it. That is not a legitimate charge, is it, Mr. Owens, to Captain Anderson?

A. We have allowed five thousand dollars for this various work you might mention.

Q. Would that include bringing somebody down from Alaska, down to Seattle? Well, can you explain this to me? Here is a check on the 4th day

(Testimony of Almon E. Owens.)

of May to Mel Blanchard for $69.00. What was that for? A. I don't remember.

Q. Well, would that be for his salary up to that date? A. I don't know.

Q. Well, why did you introduce it in evidence as an exhibit for?

A. A check paid to him during that time.

Q. For what? Could it have been a case of whiskey? Don't [98] you know what it was for?

A. I don't remember.

Q. All right. Do you have any records that will state what it was for?

A. I don't think I have.

Q. On the same day, May 4th, you wrote another check to him for $303.74. What was that for?

A. His salary.

Q. That was for the month of April? You didn't pay in advance, did you, Mr. Owens?

A. I don't think so.

Q. Well, do you know whether you paid in advance?

A. No, we didn't pay in advance.

Q. If this was for the month of April, why do you expect Captain Anderson to pay for that? Now, you have testified, Mr. Owens, that had you have had this vessel in operation you could have made eleven thousand dollars with it over a period of time. Now, what do you base that on?

A. On the work that was offered for the boat.

Q. And why do you say that you could have made eleven thousand rather than twelve thousand?

(Testimony of Almon E. Owens.)

A. I am basing that on my own production that I could have delivered.

Q. Well, what production could you have delivered with the boat? [99]

A. Five and a half million feet.

Q. And that would be barring any trouble with it or hitting any submerged objects, rocks or anything like that, and not have any crew trouble; is that true? Well, did you ever produce that much in that period of time?

A. More than that.

Q. Have you any records to show that?

A. I have

Q. Will you produce them?

A. I don't have them here.

Q. You could get them; they are available to you? A. They are available.

Q. And now, Mr. Owens, when you first discussed the purchase of this vessel from Captain Anderson, is it not true that you told him you wanted to get that boat to go south?

A. We had a job south for it; yes.

Q. All right. And now, when you testified this morning that he knew you were going to use this vessel in a lumber industry up in Alaska, actually what you told him was that you wanted the boat to go south?

A. I wanted to go down and get a barge down there that we had bought down there.

Q. Isn't that what you told him?

A. I don't remember what I told him.

(Testimony of Almon E. Owens.)

Q. You don't seem to have any difficulty remembering what he [100] told you. And as a matter of fact, the first trip you made was south, wasn't it?

A. Correct.

Q. You went down to San Francisco?

A. Correct.

Q. And so you didn't use it in the lumber industry until after you had made your use of it down south; isn't that true? A. Correct.

Q. So, at the time that you could have made this eleven thousand dollars up here in the summer time, instead of coming up to make that money, you took a trip to San Francisco on a tow job, didn't you? That is true, isn't it?

A. I have just answered that question.

Q. The answer is "Yes," isn't it?

A. Exactly.

Q. All right. Now, with regard to this lifeboat, you didn't intend to haul passengers on the vessel, did you? A. That made no difference.

Q. Just answer my question. Whether it makes any difference or not, we will leave to the Court. But you didn't intend to haul passengers, did you?

A. We are not in the passenger business; no, sir.

Q. And, therefore, you had no particular use for that lifeboat; isn't that true? [101]

Mr. Boochever: I object to that as irrelevant.

Mr. Renfrew: Well, it is not irrelevant, your Honor. It is a preliminary question.

The Court: He isn't claiming anything for dep-

(Testimony of Almon E. Owens.)

rivation of the lifeboat; he isn't claiming anything for loss of use of the lifeboat, is he?

Mr. Renfrew: Your Honor, I understand that he isn't but I have to put on this testimony in order to show something further which I will promise you I can connect up.

The Court: Objection overruled on that promise.

Q. You had no use for that lifeboat; isn't that true, Mr. Owens?

A. We had bought it, and it was our lifeboat.

Q. I don't want to argue with you, sir. I just want you to answer my questions. You had no use for it, had you? A. I wouldn't say that.

Q. Did you intend to use it on the tug Adak?

A. We might have.

Q. Well, isn't it true you told Captain Anderson you were going to put a skiff on there, a boat you could use, not a lifeboat but a work boat?

A. But that didn't go on in the place of the lifeboat.

Q. Well, but you wouldn't be hauling the lifeboat if you had another lifeboat on the boat, would you? There were two of them, weren't there? [102]

A. That is correct.

Q. And you weren't going to haul that big lifeboat around; isn't that true?

A. No, that isn't true.

Q. Do you deny that you told Captain Anderson that he could borrow that lifeboat because you didn't intend to use it anyway, it was too big, and you couldn't even get by the wheelhouse, and that

(Testimony of Almon E. Owens.)

you were going to put a work boat on there, one that you could use?

A. We told him he could borrow it.

Q. Well, now, as a matter of fact, if you intended to use this vessel not for a passenger vessel, you didn't have to have that lifeboat; isn't that right? A. That is correct.

Q. And he told you that he had to have a lifeboat in order to comply with the regulations in order to get back to Alaska?

A. That is correct.

Q. And you agreed at the Olson & Wing Dock that he could take this lifeboat; isn't that true?

A. I don't remember where I told him he could have the lifeboat to take up to Alaska.

Q. And he was to drop it off when he came down in the fall? A. No, that is not true.

Q. Well, you knew what kind of business Captain Anderson had? [103]

A. He told me he would leave the boat on the way north.

Q. Now, Mr. Owens, you certainly understood, when he asked for the use of that lifeboat, it was to make him legal on the trip that he had to go to Alaska; didn't you know that?

A. I knew that he promised me that he would leave the boat on the way north, drop into our camp and leave the boat on the way north.

Q. Do you deny that you did not loan that lifeboat to Captain Anderson in order to make his operation to Alaska legal in that he had passengers

(Testimony of Almon E. Owens.)

and he had the type of a vessel that he couldn't be documented without a lifeboat? Do you deny that?

A. I told you that I loaned the boat to him with certain reservations.

Q. You mean that your testimony now is that you were going to let him have the boat just long enough to get out of the Port of Seattle and, when he got up to your place of business, he was to drop it off? A. That is correct.

Q. Then I will ask you further. Do you deny that you told him that "I have no use for this lifeboat, Captain Anderson, at all. You can take it and use it this year. Bring it back when you come south and leave it for me"?

A. I did not ever. [104]

Q. Did you ever buy a lifeboat?

A. I had no reason to.

Q. Maybe you never did. The question was, did you ever buy one?

A. I bought this tug with some lifeboats on it.

Q. Did you ever buy a lifeboat like the one you describe? A. No.

Q. Did you ever inquire as to the selling price of them? A. Yes.

Q. Where and when?

A. Here in Anchorage.

Q. Where did you inquire in Anchorage the price of a lifeboat?

A. Northern Commercial Company.

Q. Did they tell you they had one for sale?

(Testimony of Almon E. Owens.)

A. No, sir.

Q. Did they tell you what the price of them were?

A. They told me about what it would cost to buy one.

Q. A shoe clerk or somebody like that in the store over here? His guess as to what one should cost? Who told you, what a lifeboat would cost, in the Northern Commercial Company in Anchorage? A. Their boat man.

Q. Well, who?

A. I don't remember his name. [105]

Q. When did you have the conversation?

A. This noon.

Q. This noon? A. Yes, sir.

Q. Was it on the main floor in the building?

A. I suppose so.

Q. Well, I mean by that, on the street floor?

A. Yes, sir.

Q. Just describe who you talked to.

A. I have already told you a man in charge of their boats.

Mr. Boochever: I can give you the name. The last name, I believe, is Denney.

Q. Was that the first time that you inquired, was today noon, as to the value of a lifeboat?

A. Yes, sir.

Q. And why did you put the value of this boat at a thousand dollars?

A. Because that was my estimate of the value of it.

(Testimony of Almon E. Owens.)

Q. You didn't ask anybody in Seattle?

A. No.

Q. And you have never tried to buy one?

A. I haven't had reason to buy one.

Q. You figured that if you bought the boat for twenty-five thousand that the lifeboat ought to have been worth a thousand; is that right? [106]

A. Under the conditions it was taken under.

Mr. Renfrew: Your Honor, I think that is all of my questions at this time. I may have another question or two. I can't formulate my thinking. I have such a cold I can't talk now.

The Court: You haven't anything on me.

Redirect Examination

By Mr. Boochever:

Q. Mr. Owens, back sometime ago Mr. Renfrew asked you about a conversation that Mr. Anderson had with some Canadian people in regard to the purchase of the boat. When did that take place?

A. As far as I know, there was some conversation in Mr. Mills' office.

Q. Did you talk to any Canadian people yourself? A. No, sir.

Q. Just what took place as well as you can remember it?

A. There was a call came in for Mr. Anderson on the phone, and he answered it.

Q. Did he say something to you after he talked on the phone?

A. It is possible. I don't remember it.

(Testimony of Almon E. Owens.)

Q. That is all the connection you had with any Canadian sale; is that right?

A. That is right. [107]

Q. Did you examine the logbook when you bought the vessel? A. No, sir.

Q. Did you discover the logbook before or after you discovered all this damage?

A. Afterwards.

Mr. Renfrew: Just a minute. I object to counsel's use of the words, "Did you discover the logbook." I might infer from that that it was secreted some place.

The Court: Well, there is no jury here, so I don't think it is going to make any difference as to the use of terms.

Q. Now, I believe that Mr. Renfrew asked you if you knew how Mr. Anderson purchased the vessel. I believe you stated, "No." In that regard did you mean you didn't know from whom he purchased it or the details——

A. I didn't know the details. I knew it was a government surplus boat. That is all I did know.

Q. Now, he also asked you if, when the vessel was being moved two or three miles right after you signed the agreement and the Andersons were moving it for you, as to whether you could see whether the vessel was leaking. Now, was it possible to see if the vessel was leaking?

A. There was no evidence of it.

Q. And do you know why there was no evidence of it?

(Testimony of Almon E. Owens.)

A. There was a watertight bulkhead. [108]

Q. In other words there was a watertight bulkhead in the forward part of the vessel and——

Mr. Renfrew: Counsel is doing the testifying, your Honor. Even though there isn't a jury, I think the witness is perfectly competent.

The Court: Well, but it has already been testified that there was a watertight bulkhead and that there was water in it.

Mr. Renfrew: I realize it has already been done, but I still don't want him to repeat it——

The Court: Well, I am not going to be influenced by repetition. It is just a case of where once there is testimony introduced it doesn't make any difference if somebody repeats it. It just becomes a leading question. It may be unnecessarily emphasizing it and, if you object on that ground, maybe I would sustain it.

Mr. Renfrew: I don't want to object, your Honor, because I feel it is repetition, and I wouldn't. Maybe you should object yourself.

The Court: Well, you think I do that too much now.

Mr. Renfrew: I didn't say so. Your Honor, you have accused me of two things in this court that you haven't got a thing to back it up with, so——

(Laughter.)

Q. Now, you stated that, when you did find out this trouble [109] about the engine going to

(Testimony of Almon E. Owens.)

have to have a new crankshaft and these difficulties with the boat, that you did ask your attorney to make demand on Mr. Anderson. Now, Mr. Renfrew asked you to show a copy of that letter but didn't ask anything further about it. Is this a copy of the original letter that your attorney sent to Mr. Anderson? A. I believe that is true.

Q. And what is the date of that letter?

A. The 17th of May.

Mr. Renfrew: What are you handing it to me for?

Mr. Boochever: I am going to introduce it.

Mr. Renfrew: I object for the reason that I asked him if he had any way of telling when Mr. Anderson was notified and he said that was the only way he could tell, and that is the only purpose that it could be put in for.

The Court: I suppose your objection is on the ground that it is a self-serving declaration?

Mr. Renfrew: Absolutely it is. Absolutely irrelevant.

The Court: It hasn't been offered.

Mr. Boochever: No, it hasn't been offered, your Honor.

Mr. Renfrew: Isn't that the reason you brought it over to me?

Mr. Boochever: I was about to offer it, to [110] show the demand.

The Court: For that purpose I don't think it would be objectionable.

(Testimony of Almon E. Owens.)

Mr. Renfrew: It is not the best evidence, your Honor.

The Court: You mean it is not the original?

Mr. Boochever: Do you have the original of this letter?

Mr. Renfrew: Yes, I do have the original.

Mr. Boochever: Well, then I request that that be introduced.

The Court: Well, now wait a minute. If he testifies that it was a copy made by the same process, for all purposes you don't need to have the ribbon copy.

Mr. Renfrew: Well, now, what is the purpose of this offer?

Mr. Boochever: To prove the demand. On cross-examination I believe it was maintained that there was no showing of demand even though we had a letter of Mr. Anderson's in evidence, and I want to prove the original demand and have it in evidence.

Mr. Renfrew: On the other hand, your Honor, that was not the purpose. The purpose was to show when the demand was made.

The Court: I know, but that doesn't foreclose him [111] from showing that a demand was made and, if he offered it for that purpose, he is precluded from arguing any self-serving declarations. It isn't offered for that purpose.

Mr. Renfrew: Your Honor, I thought it was already in evidence that the demand was made on the 17th of May.

(Testimony of Almon E. Owens.)

The Court: I don't know. I am not sure.

Mr. Renfrew: Counsel knows that. That is the reason I got him to hand a letter to the witness and asked him what the date was.

The Court: If you admit demand was made the same date as the letter——

Mr. Renfrew: Certainly I do.

The Court: Well, that ought to relieve the necessity of receiving the letter in evidence.

Mr. Boochever: Very well. Then it is admitted that the demand has been made setting forth the misrepresentations?

The Court: Yes.

Q. Now, Mr. Renfrew asked you when you got that letter from Mr. Anderson in which Mr. Anderson made statements about selling the boat as is and the Canadian people and so forth and did you answer it at all, and you stated, I believe, "No." Now, did your attorney answer that?

A. Not that I know of.

Q. I show you what purports to be a copy of a letter dated [112] July 24, 1947, addressed to Mr. Jack C. Anderson, and ask you if you have ever seen this copy or a similar copy of this letter. Look that over, please.

A. I remember seeing a copy of that letter now.

Q. You now remember seeing a copy of that letter? A. Yes.

Q. What is this a copy of?

A. An answer to Mr. Anderson's letter.

Mr. Boochever: Do you wish to examine this?

(Testimony of Almon E. Owens.)

Mr. Renfrew: Not in the least.

Mr. Boochever: I request that this be introduced in evidence as a copy of—do you have the original of this?

Mr. Renfrew: Yes.

Mr. Boochever: I request that this be introduced in evidence as a duplicate copy of a letter addressed to Mr. Anderson in answer to the letter that Mr. Anderson wrote to Mr. Owens.

Mr. Renfrew: I object to that, your Honor, on the ground that it is a self-serving declaration. Mr. Mills isn't here and, if he wants to testify to various statements in there—it is a letter from an attorney stating certain demands and what his client told him. My question to Mr. Owens was, did he personally ever make an answer to Mr. Anderson. You will notice the letter of June 11th was addressed to Mr. Owens, not his attorney. [113]

The Court: He could answer it by an agent, couldn't he?

Mr. Renfrew: He could. He stated on the stand he didn't remember it.

The Court: That doesn't prevent him, after his recollection has been refreshed, from testifying.

Mr. Renfrew: Under what theory of the law can that document be introduced in evidence?

The Court: Under what theory was the letter of the defendant?

Mr. Renfrew: I didn't offer it. They did. I didn't object. Your Honor let that one in.

(Testimony of Almon E. Owens.)

The Court: I leave everything go in if it isn't objected to.

Mr. Renfrew: I am objecting to this. I would like to know under what theory it could possibly be admissible.

Mr. Boochever: I believe, your Honor, it is admissible after counsel opened it up by his question himself in cross-examination and asked if there was any answer and why there wasn't, and that we can go ahead and show how there was an answer made and that there was a denial made.

The Court: I think you could if he was the one who offered it in evidence, but where he doesn't offer it in evidence, you offer it, I am inclined to think it is inadmissible.

Mr. Boochever: He is the one who brought that subject [114] up in cross-examination and asked did we answer.

The Court: But, if you bring up a subject, that doesn't open the door to hearsay.

Mr. Boochever: This isn't hearsay, your Honor. This is a statement of an answer to the contentions made in that letter, an answer of the man's attorney, his agent in the matter.

The Court: That would be perfectly correct if, as I say, he offered the letter, but you offer it. Now, you propose to——

Mr. Renfrew: To bolster it up.

The Court: I don't believe it is admissible.

Mr. Boochever: Well, your Honor, the letter came in evidence without objection, and their side

(Testimony of Almon E. Owens.)

went into the question of whether it was answered and why it wasn't answered and whether any denial was made of the allegations. Well, they can't go into that and then say, "No; we won't let you show what answer you made or what denial you made." That certainly isn't just.

The Court: Well, but on the other hand, if a party or counsel permits something to go in that might have been successfully objected to, it doesn't mean that you waive objection for all time. He can object to the very next offer. The only question, as I see it, is whether it can be said that the reply is such a part of the other exhibit, since [115] it was elicited by the other exhibit, to permit it to go in. If it was something he himself wrote, it might present a different situation. I am inclined to think it is hearsay.

Mr. Boochever: Moreover, your Honor, if there is any hearsay, it is before the Court and the Court is competent to disregard any part of that letter for hearsay reasons. We want to show it was replied to, and counsel brought it out; he opened the door for it.

Mr. Renfrew: I didn't anything of the kind. I asked the witness whether or not he, as an individual, had ever made any reply to the letter which he introduced in evidence as being addressed to him as an individual, and he said that he couldn't remember whether he did or not, and that was all that was said about the matter.

Mr. Boochever: That is right, and on redirect

(Testimony of Almon E. Owens.)

examination we can show through his agent he did make a reply. It is proper redirect.

The Court: But you want to show it to prove or disprove what?

Mr. Boochever: We want to show it to refute the more or less accusations made by the defendants' counsel that we did nothing about that letter and did not attempt to answer it or refute it in any way.

Mr. Renfrew: He has testified he answered it, his agent did. [116]

The Court: Well, I think we get back to my original point. It would be proper if the letter were offered by the defendant and admitted; then of course you could introduce the reply or answer; but that isn't what happened here. The objection will have to be sustained unless you could show, for instance, that it shows the relation between the parties entering or consummating or culminating in something else that is material here.

Q. Now, Mr. Owens, there was some testimony in regard to the date of the consummation of this sale, in other words the date that the money changed hands. Now, in order to refresh your memory on that point, I would like you to examine the letter written by your counsel, Mr. Mills, to Mr. Anderson, dated May 17, 1947.

Mr. Renfrew: I object to counsel stating what a document is and handing it to a witness. That is improper. This man obviously doesn't know what his attorney is doing; he don't know what his en-

(Testimony of Almon E. Owens.)

gineer is doing or what anybody else is doing. Now, he hands him a letter, tells him what it is. That is improper, your Honor, even before a Court. He hasn't any right to lead the witness no matter who is hearing the case.

The Court: I don't think that is objectionable. It simply eliminates asking a lot of questions and getting into the same thing in a roundabout [117] manner.

Mr. Renfrew: Then we might as well throw the rules out the window.

The Court: Well, if you hand the witness something, no matter what it is, you can say, "I hand you so and so." You don't have to say, "Now, take a look at this and, if you can tell what it is, tell me."

Q. Now, Mr. Owens——

Mr. Renfrew: He hasn't answered that question yet, and I assume your Honor allowed him to.

The Court: Maybe he wants to abandon the question.

Mr. Boochever: As a matter of fact, in the meantime I have lost my recollection of the question. I assume the witness has too.

The Court: He can abandon the question if he wants to.

Q. Mr. Owens, does that refresh your recollection as to the date the sale was consummated? I would like you to look particularly at the first paragraph of the letter. A. That is right.

(Testimony of Almon E. Owens.)

Q. Does it refresh your recollection as to when that sale was consummated?

A. That is right.

Q. And when was it?

A. The 22nd of April, 1947.

Q. Now, when that sale was consummated, did you have to enter [118] into a mortgage for the balance of the purchase price?

A. That is right.

Q. And, therefore, after that time you were liable for a sizeable amount of money regardless of whether you would rescind the contract or not; is that correct? A. That is right.

Q. Now, you mentioned you were in the Fairbanks-Morse office and that they suggested that you tear the engine, that you go into the engine further and make a further check on it. Why were you in the Fairbanks-Morse office at that time?

A. I went in there for some supplies, I don't remember what, at that time.

Q. Now, counsel mentioned Mr. Oaksmith over there. Did you say you knew him? Do you know Mr. Oaksmith? A. Yes; I have met him.

Q. When and where did you meet him, approximately?

A. I remember meeting him in the office of his company there in Seattle.

Q. What were you doing there?

A. Purchasing some supplies for the boat.

Q. Was that before you purchased the boat or afterwards? A. It was afterwards.

(Testimony of Almon E. Owens.)

Q. Now, counsel there has made some questions about these checks for Mr. Blanchard. What was Mr. Blanchard's salary? [119]

A. Four hundred dollars a month and board.

Q. Did he receive that during all that time?

A. Yes.

Q. Could he have received additional checks other than those?

A. Would have to because those checks don't cover the full salary.

Q. Now, Mr. Renfrew questioned you about taking the vessel south after you got it fixed up and that you spoke to Mr. Anderson and told him you were going to take it south. Was that to permanently use the vessel south?

A. We just took it down to get our own scow at Antioch.

Q. And what were you going to do with that scow, or did you do? A. Brought it to camp.

Q. Did you bring it back up to Alaska?

A. Yes.

Q. For use in what regard? What purpose?

A. As a camp for the logging camp.

Mr. Boochever: That is all, your Honor.

Recross-Examination

By Mr. Renfrew:

Q. You stated, Mr. Owens, that you didn't meet Mr. Oaksmith until after you bought the boat?

A. I don't remember that I did. [120]

(Testimony of Almon E. Owens.)

Q. You don't remember you did so state?

A. That I did meet him before; I don't remember that.

Q. Did you meet Mr. Dawe?

A. I don't remember that I did; no.

Q. You were staying at the New Washington Hotel, weren't you, when you were buying this boat? A. I believe that is right.

Q. Don't you remember, Mr. Owens, that you got a room at the New Washington Hotel for Mr. Dawe? A. I can't remember that.

Q. You don't recall that? A. No.

Q. You don't recall Mr. Dawe and Mr. Oaksmith and yourself discussing the possible purchase? Mr. Dawe is the man who tried to sell you the other tug; don't you remember that you had been looking all over Seattle for a tug?

A. The whole Pacific Coast as a matter of fact.

Q. Well, now, Mr. Dawe is the man you picked up in front of the Pan American Airlines office and went over to the New Washington Hotel and got him a room? A. I don't remember.

Q. You don't remember? A. No, sir.

Q. You don't remember Mr. Oaksmith being there and telling you that the TP 100 had a flat crankshaft in it? [121] A. No.

Q. And you were telling him in Mr. Dawe's presence that you would like to deal with Mr. Dawe but that you couldn't because finances is what interested you and you had to buy at the price range where you could get the terms?

A. I don't remember that.

(Testimony of Almon E. Owens.)

Q. It is true, isn't it, that you couldn't have paid any other way? A. No.

Q. There was no incentive as to you buying it for five thousand dollars down and two thousand dollars a month?

A. No. I had other ways of getting money.

Q. You would have had to pay eight per cent interest?

A. I would have had to pay that anyway.

Q. Eight per cent isn't even a legal rate in Washington, is it? A. I don't know.

Mr. Boochever: Yes, it is.

Q. Now, you have suddenly remembered that this deal was consummated on April 22nd according to what you told your counsel?

A. I read a letter that was sent at that time.

Q. Are you going on what the letter from your attorney said?

A. That is all — I can't remember all those things back four years ago. [122]

Q. Oh, yes. Where was the logbook?

A. It was down in a locker under the chart.

Q. Where?

A. In a locker under the charts.

Q. In a locker under the charts in the pilothouse? A. Yes, sir.

Q. Where the logbook ordinarily is kept on any vessel? A. No.

Q. Where do you ordinarily keep it?

A. We kept it in the upper drawer with the charts.

(Testimony of Almon E. Owens.)

Q. In the upper drawer with the charts; and this was just below it in the locker?

A. It was clear down on the floor in the locker.

Q. Hidden there?

A. Not necessarily hidden.

Q. Did you inquire about the log when you bought the vessel? A. No, I didn't.

Q. Now, you talked about this conversation in Mr. Mills' office. That is your lawyer; is that right?

A. That is right.

Q. And while you were in his office the telephone rang, and didn't I understand you to say Captain Anderson answered it?

A. He was called to it.

Q. Called to the phone. And at that time he turned around to [123] you and said, "The Canadian people want to buy the boat. Now, do you want it or don't you? I have got to let them know." A. I can't remember those words.

Q. Well, maybe not the exact words; but that was the gist of the conversation; is that right?

A. I believe that is right.

Q. And you said, "I will take it, and I will have the five thousand dollars in here for you tomorrow." Is that the gist of the conversation?

A. Something like that.

Q. That is all, Mr. Owens.

Mr. Bouchever: That is all.

The Court: I have some other matters to attend to at this time, so we will adjourn.

Mr. Renfrew: I would like to have an indication

from counsel as to the number of witnesses he is going to have, so I can——

Mr. Boochever: One, and possibly two more, and the deposition.

Mr. Renfrew: Probably two more?

Mr. Boochever: One, and possibly two.

(Whereupon Court adjourned until 10:00 o'clock a.m., March 9, 1951, reconvening as per adjournment, with all parties present as heretofore; whereupon the trial proceeded [124] as follows:)

MEL BLANCHARD

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name?

A. My name is Mel Blanchard.

Q. And where do you live now?

A. Orick, California.

Q. What is your present occupation?

A. Logger.

Q. And for whom do you work?

A. Arcadia Redwood.

Q. Is Mr. Owens, the plaintiff, or Owens Brothers associated with that company at all?

A. No, sir.

Q. Now, in 1947, for whom did you work?

A. Owens Brothers.

(Testimony of Mel Blanchard.)

Q. And did you work in Seattle at all for them in 1947? A. Yes, I did.

Q. How did you happen to come to Seattle?

A. Well, after Mr. Owens had purchased the boat.

Q. What boat is that?

A. At that time it was the TP 100, but later the Adak. He [125] asked me to go down to Seattle for the period of two or maybe three weeks to get the boat in condition to run and then we was coming on to Alaska.

Q. Mr. Blanchard, would you pull that microphone up a little closer?

The Court: You will either have to speak loud enough or, if you don't, you will have to use the microphone.

Q. Now, did you go on down to Seattle?

A. Yes.

Q. About when was that?

A. Approximately the middle of April. It could have been a little bit longer.

Q. Of what year? A. 1947.

Q. And when you went down there did you meet the defendants in this case, Mr. Anderson—Senior and Junior? A. Yes.

Q. About when and where did you meet them?

A. Well, I think it was about the second day of my arrival and some place in Seattle. I don't know exactly where it was.

Q. And who were present at that time?

(Testimony of Mel Blanchard.)

A. Mr. Anderson, his son, Mr. Owens and myself.

Q. Did you have any conversation with the defendants at that time? [126] A. Yes.

Q. Did Mr. Anderson, either of them, state—make any statements to you in regard to this boat, the TP 100?

A. Yes. During the time that we were together why he made the statement that the crankshaft had to be, or one pin bearing had to be smoothed up and also the main bearing replaced and that there was slight damage to the forefoot.

Q. Did he state as to the condition of the rest of the vessel?

A. As far as the condition of the rest of the vessel, those two things; but I do remember though of him stating that he had had the boat on drydock some place in Seattle; I don't know just where.

Q. Now, did you go to work on the vessel?

A. Yes.

Q. And what were you engaged in doing on the vessel?

A. Well, I was engaged in various kinds of work, mostly to the engine room.

Q. Mostly to the engine room? A. Yes.

Q. And whom were you working with when you went to work on there?

A. I was working with the Fairbanks engineer, Ted Engstrom.

Q. And what did you find had to be done to the engine?

(Testimony of Mel Blanchard.)

A. It was found that the crankshaft had to be removed. [127]

Q. Why was that necessary?

A. Because it was impossible to do the work on the boat. It had to be taken out and put in a lathe because not only one but several had to be turned down.

Q. Several what?

A. Several bearings on the crankshaft.

Q. Now, what else did you find in regard to the condition of the engine?

A. Well, we found that we had to rebore out all the oil columns that supplied oil to each bearing.

Q. Why did you have to do that?

A. Because they were filled full; because the oil columns were plugged with melted babbitt from the bearings.

Q. What would the effect of that be on the operation of the vessel?

A. As long as your oil columns plug with babbitt or any other form of metal, it would be impossible for oil to reach the bearing.

Q. Was there any other method you noticed for the oil to reach the bearings in this case?

A. Yes. There was a temporary arrangement hooked up there, and we noticed that was on the boat when we arrived.

Q. Was that an arrangement that could have been used for any length of time?

A. No, it was not. [128]

(Testimony of Mel Blanchard.)

Q. Now, in regard to the engine, what was the condition of the base of the engine?

A. The base of the engine we found, of course, we didn't find it right away, but at the time we were putting the new crankshaft in we found the base of the engine, where the lower half of the main bearing goes into your base, was warped.

Q. Could you tell why that was warped or what caused that? A. From the heat.

Q. Now, when you took the crankshaft out, what was necessary to be done in order to take that crankshaft out?

A. I had to get a ship's carpenter to come down there and tear out just a piece of the watertight bulkhead between the engine room and cargo hold.

Q. Is that the watertight bulkhead in the front of the vessel or rear of the vessel?

A. In the rear of the vessel. Also we had to take out part of the hatch coaming on deck, and naturally we had to break the motor loose at the base. It was bolted to the base, and jacked it up about five feet in the air to remove the crankshaft.

Q. What was the size of that crankshaft?

A. Twenty-two feet long and nine inches in diameter.

Q. And do you know what was discovered, when they removed the crankshaft and took it out, in regard to its condition? [129]

A. After the crankshaft was put in the lathe, they found it had been warped from the heat.

Q. Could it be used? A. No.

(Testimony of Mel Blanchard.)

Q. What was, therefore, necessary?

A. It was necessary to have a new crankshaft.

Q. Now, how long was it after you went to work down there before you discovered that you had to have a new crankshaft? Was it several weeks or a few days or what?

A. I would say in the vicinity of about two weeks.

Q. Now, after that was discovered, did you make any other discovery about the condition of the vessel?

A. Yes. One day I was turning around, turning the boat around, for some reason or other. I wanted to get something on the deck or off the deck. I forget which, but in turning the boat around at the dock why the sun was shining just right underneath the water where I could see just underneath the waterline. I noticed that there were slivers hanging down, indicating that the boat was damaged underneath the water.

Q. Was that the first time that you had noticed that? A. Yes.

Q. Could you see that normally when the vessel was in the water? A. No. [130]

Q. Could you see the entire damage to the front end of the vessel at that time? A. No.

Q. Just some slivers?

A. Yes. Just that there was damage.

Q. Did you make an investigation of that then?

A. I did. I took a look in the forward compartment, sometimes called the chain locker, which

(Testimony of Mel Blanchard.)

has the watertight bulkhead between it and the engine room, and there was water in the watertight bulkhead.

Q. Is that the first time you looked in there?

A. Yes.

Q. And did you do anything about trying to get the water out of there or not?

A. Yes. I was curious to know whether the water had leaked in from the top or had come in through from where it was damaged, so I got a man to help me, and we tried to bail it out, and we could draw it down maybe an inch or two, but it would immediately rise back to its proper level.

Q. What was the level of the water inside that bulkhead as compared with the level of the water outside?

A. The water on the inside was the same level as the outside.

Q. And you were not able to bail it out?

A. No.

Q. Would you put the microphone a little closer to you. [131] After that happened, what was done in regard to the vessel after you made that discovery?

A. After I made that discovery, I informed Mr. Owens in Alaska.

Q. And did he come down?

A. That is right.

Q. And then what was done?

A. He made arrangements to put it on drydock.

Q. And during this time that you were work-

(Testimony of Mel Blanchard.)

ing on the vessel were there any other of Mr. Owens' men working on the vessel?

A. Yes, there were; Mr. Tucker, the chief engineer, and there was Mr. Eaton—he was also an engineer, second engineer or assistant engineer, whichever way you want to word it—and Mr. Jacobson, Mr. Moore.

Q. And were all of those men—what was Mr. Moore's occupation there?

A. Mr. Moore was a cook.

Q. Cooking for the men working on the boat?

A. That is right.

Q. What were the other men doing in regard to the boat?

A. Mr. Eaton and Mr. Tucker and myself and Mr. Jacobson, we all more or less was in the engine room getting this crankshaft out. We more or less put all our attention to that one part of the boat. [132]

Q. Then you got the boat put up on drydock, you said? A. Yes.

Q. What did you discover about the condition of the front end of the vessel when it was put up on drydock?

A. We discovered immediately that it was very much damaged.

Q. Now, I show you two exhibits here——

Mr. Boochever: I would like those two photographs please.

Q. I show you Plaintiffs' Exhibit No. 7 and

(Testimony of Mel Blanchard.)

ask you if you can identify what that is a picture of? A. Yes. That is the boat in question.

Q. Do you know about when that picture was taken?

A. We got the boat up on drydock after dark. We had some difficulty getting the boat up on the ways on account of this stem iron hanging down and knocking out chocks on the ways, and these pictures were taken the next morning.

Q. Were you present when the pictures were taken? A. I was, yes.

Q. And did you see the pictures after they were developed? A. Yes.

Q. And is this a true representation of the way the vessel looked when it was brought up on the ways there? A. Yes.

Q. Now, I show you Plaintiffs' Exhibit 8 and ask if you can identify that? [133] A. Yes.

Q. What is that?

A. The same picture, a different angle.

Q. And the same circumstances in regard to taking this picture apply as to the other one?

A. Yes.

Q. And that is a true representation of the way the vessel looked at that time and place?

A. Yes.

Q. Now, where is the waterline of the vessel as indicated on this picture; where was the waterline?

A. I would say the waterline was just above the top of this picture.

(Testimony of Mel Blanchard.)

Q. In other words, you wouldn't even see the waterline on that picture? All that is below the waterline? A. That is right.

Q. And in regard to this picture, can you show where the waterline would come on the vessel?

A. The same as that, only you might see a little bit of it in this one corner, but the front you couldn't see. It is beyond the picture and above.

Q. Now, in regard to this damage, Mr. Blanchard, does this damage constitute a bruised forefoot, would you say? A. No.

Q. What is the damage there? [134]

A. The damage is, the lower part of the stem is damaged considerably. More or less it meant a new stem, is what it meant. The forefoot, you might say, is completely gone, and you can see there is new planking to be had.

Q. Was water running in and out through this damaged area here? Could it run in and out?

A. Yes.

Q. Now, prior to the time of taking the vessel up on the ways and discovering this extensive damage, did you have any additional conversation with the defendants besides the one we referred to before?

A. Well, regarding this lifeboat; yes.

Q. What happened in regard to that?

A. Mr. Owens informed me that Mr. Anderson was——

Mr. Renfrew: Just a moment. Is this conversation, do I understand, in the presence of Mr. Anderson?

(Testimony of Mel Blanchard.)

Q. We aren't interested in what Mr. Owens informed you. I want to know what conversation you had with Mr. Anderson.

A. Mr. Anderson came there with his power barge to borrow this lifeboat which, I understood, he asked permission to borrow from Mr. Owens.

Q. What was the condition of the lifeboat?

A. The lifeboat was in good condition.

Q. What was it made of?

A. It was a steel lifeboat. [135]

Q. And what did Mr. Anderson say, if anything, in regard to borrowing the lifeboat?

A. Well, that he wanted to borrow it to make his trip into Alaska to get through the Coast Guard regulations.

Q. Did he say anything about returning the lifeboat?

A. Yes. He was supposed to return the lifeboat to Mr. Owens' camp.

Mr. Renfrew: I didn't hear you.

A. He was to return the lifeboat to Mr. Owens' logging camp in the vicinity of Ketchikan on his arrival in Alaska.

Q. Mr. Anderson told you that? A. Yes.

Q. Now, do you know whether Mr. Anderson returned the lifeboat? A. He did not.

Q. How do you know that?

A. I was up there right after that, and Mr. Anderson told me himself that he hadn't.

Mr. Renfrew: It is admitted by the pleadings. It is surplusage.

(Testimony of Mel Blanchard.)

The Court: Yes.

Q. Now, Mr. Blanchard, what were you receiving as wages while you were working on the vessel?

A. Four hundred dollars a month and board.

Q. Approximately how long were you working on the vessel [136] there?

A. Three and a half months.

Q. These other employees of Mr. Owens' that you mentioned, did they receive their board while working on the vessel? A. Yes.

Q. Did you make any purchases on behalf of Mr. Owens while working on the vessel?

A. Yes.

Q. With funds of your own or with other funds?

A. With funds of my own.

Q. And what did you purchase for the vessel?

A. We had to have various kinds of tools to tear down the engine and remove this crankshaft, and also in the first place we had to get about a thousand feet of timbers down there to jack this foundation up in the air to remove the crankshaft. We had to buy six hydraulic jacks, and we had to also get ahold of some chain hoist to help remove the crankshaft and then in putting the crankshaft back, and before we put it down we had to get an electrical motor to turn the crankshaft on the main bearing to make sure that there was no binding.

Q. Were you ever reimbursed for those expenditures? A. Yes.

Q. I show you Plaintiffs' Exhibit for Iden-

(Testimony of Mel Blanchard.)

tification No. 19 and ask you if you can identify this document? [137]

A. Yes; I remember that.

Q. What is that?

A. That is a check for, to me from Mr. Owens, for the money I had spent to buy things for this boat.

Q. And how much is that? A. $1,678.00.

Mr. Renfrew: We object to the introduction of this check, your Honor, in evidence as—three reasons. One, it is not disclosed where the itemized account is for equipment. And two, under the witness' testimony, if he bought hydraulic jacks and hoists and tools to remove the crankshaft, he didn't throw them away afterwards, and certainly the value of those tools wouldn't be depreciated to any appreciable extent merely by the use in this business. We feel it is an irrelevant offer and, even if legitimately used, it is not damage in this case.

The Court: It would depend on whether you could do the job by letting it out or by your own crew.

Mr. Renfrew: If a man buys a chain hoist and uses it once to lift an engine or let an engine down, he is not entitled to charge somebody for the hoist forever because he used it once. Those things are——

Mr. Boochever: In regard to the weight and amount of the damage—but I think this is certainly admissible at this point. [138]

Mr. Renfrew: My point is, we don't have any

(Testimony of Mel Blanchard.)

itemization of this stuff. It is an employer-employee relationship, and he shows a canceled check for so much money and says, "I bought something with it."

The Court: Well, in the case of tools or machines of that kind, if they run into money, they would hardly add to the cost of repairs.

Mr. Boochever: The only reason it was required was because of the extensive repairs to the vessel. They wouldn't have bought them otherwise. I agree there is probably a resale value if it can be ascertained.

The Court: That would probably be true, but without an itemization how could you get it in, unless he can testify to the cost?

Mr. Boochever: Of each item, do you mean?

The Court: Each item that is more than merely a hand tool.

Q. Could you testify to the cost of each item at this time, Mr. Blanchard? A. No, I couldn't.

The Court: Well, what kind of items make up this charge? Expendable? For instance, could you say what proportion of this charge would consist of expendable items? It is all for parts, is it?

A. I don't quite get what you mean. [139]

The Court: Well, what did you buy to that amount outside of jacks and the hoist?

A. Like I said, we had to buy some lumber, some heavy timbers, to jack up this engine with.

The Court: Well, how much of that bill would be represented by items that didn't go into the

(Testimony of Mel Blanchard.)

vessel, for instance, when you got through with the job, you would have left over?

A. We would have left over practically everything.

The Court: You wouldn't have the lumber, would you?

A. No. But it wouldn't go into the engine. Naturally we would have it, but we sawed it into short pieces that you couldn't do anything else with it. If it was eighteen and twenty-foot lengths when we got through, as it was when we got it, maybe we could have.

Mr. Boochever: Your Honor, we will waive that check. It was not included in the items in the complaint. It was discovered afterwards. We thought it was damages but, if your Honor feels it isn't relevant, we will waive it.

The Court: Well, I suppose you can always amend to conform to the proof, but there ought to be a segregation of the items which went into the boat from those like tools that would be left over.

Mr. Boochever: I believe from what he testified none went into the vessel. They went into repairs and left [140] over timbers. The timbers were cut into smaller pieces.

Q. Mr. Blanchard, while you were working about the boat and working around the boat did you discover the logbook of the vessel?

A. Yes, I did.

Q. Where did you find that logbook?

A. It was in the pilothouse.

(Testimony of Mel Blanchard.)

Q. Where in the pilothouse?

A. I don't remember just exactly where it was, but it was in the pilothouse.

Q. And did you look the logbook over?

A. Yes, I did.

Q. When did you do that? Was it before or after you discovered the damage to the front end of the vessel?

A. It was after I discovered the damage.

Q. Did you find an entry in regard to striking a rock? A. Yes.

Q. Did you bring that to Mr. Owens' attention? A. I did.

Mr. Boochever: Your witness.

Cross-Examination

By Mr. Renfrew:

Q. Mr. Blanchard, you say your occupation is logging? A. That is right. [141]

Q. How long have you been engaged in that type of work?

A. Off and on for about fifteen years.

Q. Down in the Oregon and California country or——

A. No. I have only spent two years in California. The rest of it has been Washington, Oregon and also Alaska.

Q. How much boat experience have you had?

A. Well, the most boat experience that I have had was, before this time, was around cannery tenders and various fishing boats.

(Testimony of Mel Blanchard.)

Q. What do you mean; as deck hand or passenger or what?

A. A little of everything; deck hand part of the time, and maybe I would be in the engine room the next time.

Q. You don't hold a ticket then of any kind; is that it? A. That is right.

Q. And you are not an engineer? A. No.

Q. Did you ever tear down a motor in a boat the size of this one before?

A. No, I did not.

Q. Did you ever tear down the motor in any boat? A. No.

Q. This was your first experience with anything like this, I take it?

A. Anything that size; yes.

Q. How long had you worked for Mr. Owens up to this time? [142]

A. I would say in the vicinity of six months.

Q. And that had been up in the logging operations in Alaska, had it? A. That is right.

Q. I believe I understood you to state that when you got to working for Mr. Owens he asked you to come down for two or three weeks while the boat was——

A. I was in camp at the time he came to me and asked me to go down to Seattle until this work was cleaned up and more or less help and then bring the boat to Alaska.

Q. After he left the boat and came on north,

(Testimony of Mel Blanchard.)

that is where you had this conversation about you going down to help get the boat up?

A. No. We was in Alaska at the time he asked me to go down, as a matter of fact in camp, and I agreed to go down there under those conditions, that I would only be down there two or three weeks, and we both went down to Seattle that same day.

Q. That was after Mr. Blanchard had bought the boat? A. You mean Mr. Owens?

Q. Yes. Excuse me.

A. As far as I know, he had bought the boat; yes.

Q. After he bought the boat he came back to his logging operations?

A. That is correct. [143]

Q. And got you to go back to Seattle to help fix up the boat and get it in shipshape for the trip? A. That is right.

Q. Then I take it you were not present when Mr. Owens and Mr. Anderson negotiated for the purchase of the boat? A. No, I was not.

Q. And you don't know anything about what they said to each other at that time, and particularly you don't know anything about the conversations that they had?

A. Yes. There is a conversation I was present at the time it was made.

Q. You have already told that to your counsel; but I am talking about the time the boat was purchased.

A. About the purchase, no, I was not present.

(Testimony of Mel Blanchard.)

Q. All right. Now, about what time did you come down with Mr. Owens?

A. As I said before, it was around the 20th of April. I am not sure just what day it was.

Q. How did you come down?

A. Come down by airplane.

Q. Do you remember how you paid for your ticket? A. Mr. Owens paid for that ticket.

Q. Out of his pocket? A. Yes.

Q. Cash? [144]

A. As far as I know, I don't know how he paid for it. He just handed me a ticket.

Q. You know you didn't pay for it?

A. That is right.

Q. You are positive of that? A. Yes.

Q. Your memory is good? A. Yes.

Q. And you couldn't be mistaken?

A. That is right.

Q. Now, after you got down to Seattle you met Captain Anderson and his son?

A. That is right.

Q. Where did you meet them?

A. Like I said before, some place in Seattle. I don't know exactly where it was.

Q. Was it a chance meeting?

A. I don't remember whether it was a chance meeting or if arrangements were made; I don't know. I was with Mr. Owens at the time I met the Andersons.

Q. What conversation took place there at that time?

(Testimony of Mel Blanchard.)

A. There was quite a bit said about this, that and the other thing. I don't remember word for word, but after we found this other damage to the boat then I did remember certain statements made, and it was about this crankshaft. [145]

Q. Oh, you mean that you didn't remember this conversation that you remember now until after you had found out that the crankshaft would need some additional work to it?

A. No, that isn't what I meant. What I meant was this, that there were some things came clearer in my mind than others, but I do remember Mr. Anderson saying that it was about this crankshaft, and it was just one pin bearing had to be smoothed up and that there was slight damage to the forefoot, also that he had had the boat on drydock some time or other during its stay in Seattle.

Q. Well, now, as a matter of fact, if Mr. Anderson said anything, wasn't the conversation something like this: "I bought that boat from Army Surplus in Alaska and I just brought it down from Alaska. I have used it up there all season and have just come down with it"?

A. I don't remember of him saying that he used it in Alaska, but I do remember him saying that he just brought it down from Alaska sometime that winter. I don't remember just when.

Q. Did you have a discussion with him about this temporary arrangement for oil which you say you saw on the boat?

A. No, I don't remember anything like that.

(Testimony of Mel Blanchard.)

Q. Was it obviously a temporary arrangement for oiling? Was it difficult?

A. No, it was not difficult. [146]

Q. Anybody looking at the engine could see it?

A. Well, anybody that knew what they were looking for; yes.

Q. Well, for instance, a man, that has been around boats all his life and bought several boats, looking at it could see a hole there with one piston hung up, and knew what he was looking at, would also be able to determine that it was a temporary oiling arrangement?

A. Well, a temporary oiling arrangement, if it had been in this one position where the hole was open, yes, it could have been noticed.

The Court: What is this hole in?

A. An inspection plate that you take off to prime the motor.

The Court: Well, but you referred to an oil column. What do you mean by that? An oil duct?

A. An oil column is a hole that runs the full length of your motor at the base, and also there is a hole goes up into each main bearing from the main oil drum, and one hole goes up for the intake of the oil, and also for the return. There are two holes. The oil makes a complete revolution. It goes through under pressure and is also forced up through each saddle and to each main bearing under pressure.

The Court: You mean that the pipes or ducts

(Testimony of Mel Blanchard.)

leading from the column to the various parts of the motor were plugged up? [147]

A. They were plugged up with melted babbitt.

The Court: How could you tell that without examining it?

A. Well, you couldn't tell it until you got into it.

The Court: That is what he was asking you about.

Mr. Renfrew: No, your Honor, that isn't what I was asking him about at all.

The Court: I misunderstood you then.

Mr. Renfrew: I understood the witness to testify that there was a temporary arrangement for oiling hooked up. A. That is right.

Q. Now, the babbitt in the oil line wouldn't be the temporary arrangement. I don't know myself what the temporary arrangement was. What was it?

A. Well, it was a by-pass to get around this of the oil going through the oil columns, a by-pass from the top instead of coming up through the bottom.

Q. You mean that by-pass was arranged around that cylinder, number five, that was hung up?

A. I don't remember which cylinder it was.

Q. Well, that would be the only cylinder that wouldn't require any oil, would be number five that was hung up, wouldn't it?

A. Yes. But, if the oil column was plugged up, there wouldn't be any bearing getting any oil, only the ones behind [148] it. It would be necessary to

(Testimony of Mel Blanchard.)

put in a temporary arrangement to get the oil to the bearing.

Q. Now, when did you discover that this crankshaft was in bad shape, other than the bearing that was hung up?

A. It was after the Fairbanks-Morse man, Ted, was down there. He took the upper half of the main bearing off.

Q. Did he mike them?

A. I don't know if he miked them or not, but it showed signs of being badly scored.

Q. Do you know when that was?

A. Shortly after he came down to the boat.

Q. I mean when with relation to the month or year? A. 1947.

Q. All right. Now, when in 1947? What month?

A. That was in April.

Q. All right. What time in April?

A. I would say in about the third week in April to be as near correct as I can.

Q. You mean sometime in——

A. Between the time I came down and the last of the month.

Q. Well, how long after you had been down there? A. I would say about a week.

Q. About a week after you had been there?

A. Yes.

Q. And, if you came down on the 20th, why you think it would [149] be about the 27th?

A. If I came down the 20th; it might be the

(Testimony of Mel Blanchard.)

18th; it might be the 15th; I don't know, but somewhere in that vicinity.

Q. How did the Fairbanks-Morse people happen to come out there?

A. As far as I know, Mr. Owens asked them to come out there.

Q. Now, you have described the work you and your associates were doing on the boat. I thought the Fairbanks-Morse people took the job of removing that shaft?

A. That is right, they did take the job. We assisted in helping them.

Q. How many men did they have on the job?

A. Two.

Q. Am I to understand it took six men to remove that crankshaft? A. That is right; yes.

Q. And you all worked at the same time?

A. That is right; yes.

Q. Now, you claim you had to get a ship's carpenter to cut out the bulkhead in the rear to remove the crankshaft? A. That is right; yes.

Q. Didn't you talk to Mr. Owens about removing the stack and lifting it out like you are supposed to do on that type of vessel?

A. Mr. Owens wasn't there at that time and, as a matter of [150] fact, it wasn't my idea. It was the Fairbanks-Morse taking it out. They were supervising this job.

Q. You never made any inquiry of Mr. Owens how to get it out?

(Testimony of Mel Blanchard.)

A. No. I figured Fairbanks-Morse knew more about it than he did.

Q. It was Fairbanks-Morse's idea take it out that way? A. That is right.

Q. Now, in order to determine whether this crankshaft was warped in any way, they had to put it in a lathe?

A. I wouldn't say they had to put it in a lathe. But that is where they found it. Maybe they could have found it; I don't know.

Q. Well, didn't they tell you that they couldn't tell without taking it out?

A. No. The reason they took it out was to return the crankshaft and make it a smaller size and make the bearings accordingly.

Q. They told you that is what they were doing?

A. Yes. I was right there. That is what they were planning on doing, taking it out and re-turning the crankshaft.

Q. And now, did you say that when you came down from Alaska you thought you were only going to be there two or three weeks and then you were going right back to Alaska?

A. That is right; yes. That was the understanding at that time. [151]

Q. And you were going right back up to Alaska to the logging camp? A. Yes.

Q. Was your family up there?

A. I didn't have no family.

Q. You know definitely then what you were going to do? A. Yes.

(Testimony of Mel Blanchard.)

Q. You couldn't be mistaken about that?

A. That is what I understood at that time, yes, before I left for Seattle.

Q. Well, as I say, now, it is definite that you intended to come down there and help fix the boat up and then go back up north and stay on the boat; wasn't that your job? A. Yes.

Q. You didn't know that there was a trip planned to San Francisco for that boat?

A. No, I never.

Q. Mr. Owens didn't tell you that?

A. Just a minute. Mr. Owens mentioned before I went down about this Frisco trip and about bringing this scow up to use in his operation, and we was coming back to Alaska to do some towing that had to be done, and then after we got the towing cleaned up and then get away, then we were going to Frisco and pick up the barge.

Q. Oh, you were coming back to Alaska first before you went [152] to pick up the barge?

A. That is right. At that time the plans were made that way.

Q. Then you don't know anything about his conversation with Captain Anderson about whether or not the boat would be safe to go to Frisco in?

A. No, I don't.

Q. Now, when you looked in the bulkhead and saw the water there after you noticed the splinters on the forefoot, that was a comparatively easy job to look in there, wasn't it? A. Yes.

Q. How did you do it?

(Testimony of Mel Blanchard.)

A. Well, there is a steel round manhole on top, I would say about two feet in diameter, like a manhole on an ordinary street.

Q. Right on the deck? A. That is correct.

Q. And anybody could go look in there if he had a desire to see down there?

A. That is right; yes.

Q. And now, as I understood you to testify, Mr. Blanchard, that you were there when Jack Anderson came after the lifeboat? A. I was; yes.

Q. Mr. Owens wasn't there? [153] A. No.

Q. And you didn't hear the conversation between Mr. Owens and Mr. Anderson when he made arrangements to get the lifeboat?

A. I don't remember if I was present at the time or not, but Mr. Anderson told me himself when getting the lifeboat that he was to return it to Ketchikan.

Q. To Ketchikan?

A. He was to return the boat at Ketchikan on his arrival.

Q. In Ketchikan?

A. No. To the logging operation in the vicinity of Ketchikan.

Q. Where is that?

A. The Ketchikan logging operation was at Menefee Inlet at the time.

Q. Menefee Inlet? A. Yes.

Q. Did he say Menefee Inlet or did he say in the vicinity of Ketchikan?

A. Well, I don't remember whether he said in

(Testimony of Mel Blanchard.)

the vicinity of Ketchikan, but he said to his logging operation, wherever that might be.

Q. Are you positive that he said that to you?

A. Yes.

Q. And he didn't just come over and say, "I came after the lifeboat," and you said, "O.K.," and let him have it? [154]

A. No; because I understood beforehand that he was coming after it.

Q. That is why I wondered why you had to have this conversation with him about what he was going to do with it if you knew beforehand that he was coming after it. He came after it. You were just a deck hand, weren't you?

A. Sure, I knew before he was coming after it; but what arrangement him and Owens had made together, I didn't know.

Q. Did you take it upon yourself to find out?

A. Yes. After Mr. Anderson came after the boat I attempted to find out what the score was, whether he bought the boat from Mr. Owens or was going to borrow it or what.

Q. Oh, I see. Mr. Owens hadn't told you that Mr. Anderson was to have the lifeboat when he came after it?

Q. Yes; he told me that Mr. Anderson was going to borrow the lifeboat; yes.

Q. Well, now, you just got through stating that when Anderson came after it you wanted to find out what the score was, whether he bought it or what.

A. Yes; but that was sometime after that,

(Testimony of Mel Blanchard.)

though. He might have bought it in between time for all I know.

Q. I understand. Thank you. Now, you testified that you found the logbook?

A. That is right.

Q. Didn't Mr. Owens find the logbook? [155]

A. No, I don't think so. I found the logbook.

Q. Well, where did you find it? It wasn't hidden, was it?

A. No; I don't remember whether it was hidden or not. I don't believe it could be. I found it in the pilothouse; I don't remember where.

Q. Didn't you think it was odd you had to look for it?

A. Well, naturally you take a boat that hasn't been used for three or four months, people running all over the boat and coming and going; there is a special place for your logbook, but I don't remember whether it was in any special place or laying on the desk or on the floor or where it was, but I know the whole pilothouse was in a mess.

Q. When you did find it, you looked through it and then I take it you made this discovery in the logbook about the notation that the vessel had struck a rock and—— A. That is right.

Q. And you immediately got ahold of Mr. Owens, did you?

A. I informed Mr. Owens that I found that in the logbook; yes.

Q. And then he wanted to see it, did he?

(Testimony of Mel Blanchard.)

A. Yes.

Q. And he said, "That is a surprise to me," did he?

A. I don't remember what he said now, but it was more or less of a surprise to everybody.

Q. He didn't know about it before?

A. Not to my knowledge, no. [156]

Q. Well, if he was surprised——

A. Well, I don't know if it could have been a surprise or not. He might have known it. I don't know whether he did or not.

Mr. Renfrew: May I see Exhibit 18, please?

Q. I hand you Plaintiffs' Exhibit No. 18, Mr. Blanchard, and ask you if you can identify the signatures on the reverse of those checks as being your signatures?

A. Yes, they are all mine.

Q. Now, I want to call your attention to the first check here, dated April 18, 1947, and that check is made payable to Mel Blanchard, and is endorsed by you, for $78.63 and signed by Mr. A. E. Owens of Owens Brothers. Can you tell me what that was in payment of?

A. No, I can't off hand.

Q. It was cashed at the First National Bank at Ketchikan on April 21st and cleared through Juneau on April 26th. You don't remember what that was for? A. No.

Q. Do you know what the fare is from Juneau to Seattle?

A. No, I don't remember what it was at that

(Testimony of Mel Blanchard.)

time. Even right now I don't know what it was.

Q. The second check here is one payable to you, endorsed by you, on May 28th for three hundred dollars. Do you know what that was for? [157]

A. As far as I know it could be my monthly salary.

Q. What were you getting in wages? Didn't you say four hundred? A. Yes.

Q. And your board? A. Yes.

Q. And Social Security and Withholding Tax and everything would be figured in. That was deducted, wasn't it? A. Yes.

Q. Well, it wouldn't be for your wages then, would it?

A. Well, if you take off Income Tax from four hundred, it would be pretty close.

Q. Then on the 4th day of May you got sixty-nine dollars. Do you know what that was for?

A. No.

Q. You hadn't advanced any money up to that time on any repairs?

A. I don't remember whether it was before that or not.

Q. Well, on May 4th you got another check for $303.74. Now, during the month of May that made $672.74 that you got. Do you know what that was for?

A. Yes; I can explain that part, why those checks were so close together, because sometimes up in there when Mr. Owens was in the logging operation, sometimes he didn't pay up for two or

(Testimony of Mel Blanchard.)

three months. It all depended on when [158] you wanted it. If you didn't want to draw your money this month, you could the next month. That might be; I don't know.

Q. In other words this might be for back wages that you had earned before this date?

A. It could be possible, yes; but I am not sure.

Q. You don't know what this $78.63 or $69.00 was for?

A. No, I don't know what that was for.

Q. In the matter of these expenses that you——

Mr. Renfrew: Well, I don't need to go into that at all. As I understand it, it has been withdrawn? Has it been withdrawn?

Mr. Boochever: Yes, that has been withdrawn.

Mr. Renfrew: That is the $1,678.00 item—$1,-678.02.

Q. Now, Mr. Blanchard, after you discovered the forefoot was damaged by looking down in the water, as I understand it the sun was shining?

A. I didn't discover the forefoot was damaged. The only thing I discovered by looking in the water, as far as I could see, I did notice there was some damage down there but I couldn't tell the extent of it.

Q. Well, you knew that before; you stated you heard Captain Anderson say so.

A. Yes, that the forefoot was slightly damaged, but you couldn't see that in the water. All I could see was just [159] below the waterline.

(Testimony of Mel Blanchard.)

Q. Well, why did you call Mr. Owens then when you knew it was damaged already?

A. Why did I call Mr. Owens for what?

Q. Well, didn't I understand you to say that you notified him in Alaska to come back down, that the forefoot was damaged?

A. I didn't notify him about the forefoot. I just said that the boat was taking water and would have to be put on drydock to determine the extent of the damage.

Q. And he came down? A. That is right.

Q. And then you took it over and put it on drydock? A. That is right.

Q. And now, how much work did the crew—that is, I am speaking of Tucker, Eaton and Jacobson and yourself—do over there when it was put on drydock?

A. During the time it was on drydock Mr. Tucker and myself overhauled the auxiliary motor.

Q. You overhauled the auxiliary motor. Was there something wrong with it, too?

A. Yes. It had to have some new bearings in it, and it was more or less of a check-over on our own part, too.

Q. In other words, you were doing odd jobs around the boat? A. Yes. [160]

Q. All of you were?

A. It wasn't odd jobs. We were doing what we could.

Q. Making it shipshape?

A. I might name a few things. We had to free

(Testimony of Mel Blanchard.)

up both anchor winches in the bow. They hadn't been greased for so long the salt water had frozen the various levers and controls to operate it. Also the stern towing winch, and found that it was also froze up from water corrosion, and we had to take it apart, not the whole thing, but certain parts of it, and free it up, and there is probably other things I can't think of right now.

Q. Well, in general, what you were doing was going all over the vessel, and anything that needed to be done to put it in first-class shape, you were doing?

A. Yes; but at first, though, we put our attention to the engine room and getting it ready, so when we got back to the Stikine Fish Company dock we would be ready to put the crankshaft in there, put it together.

Q. All right. But your men didn't do anything on that carpentry work on the boat, did they?

A. Well, I couldn't say too much about that, because maybe they was part of the time. I don't know.

Q. Is that the first time you were ever around a drydock yard in Seattle?

A. That is right. [161]

Q. You wouldn't say that any of your men went out and worked with the men on that drydock, fixing the keel on that boat?

A. There could have been times that they did; yes. I don't remember. There could have been

(Testimony of Mel Blanchard.)

times they asked for help, yes, like putting the keel in place.

Q. You mean it is possible, but you didn't see it?

A. We was all down there sometime or other, but there wasn't too much of it, but then we did help around there when they needed a few extra men to lift something heavy or like putting the stem in place so they could lift it up there and carry it around and something like that. Yes, we helped them out.

Q. If they needed a hand? A. Yes.

Q. But the work was done by them?

A. Mostly, yes.

Q. Were you on the boat when she came north?

A. To Alaska?

Q. Yes. A. I was, yes.

Q. Was that the time that the crew was discharged in Ketchikan and a new crew taken on?

Mr. Boochever: I object to that. It is irrelevant, immaterial and incompetent. [162]

The Court: Is this to prove something unrelated to the job or what?

Mr. Renfrew: Well, it may be, your Honor. I was trying to fix the time of this incident. I am not certain about it. I may be mistaken. I don't think the answer, however to that particular question could be prejudicial one way or the other.

Mr. Boochever: Well, I don't know anything about what he is leading up to, of course, but anything about the crew being discharged has nothing to do with this case, your Honor.

(Testimony of Mel Blanchard.)

The Court: Well, just because it wouldn't be prejudicial wouldn't be sufficient basis for asking the question.

Mr. Renfrew: I will withdraw the question.

Q. Well, as I understand it, Mr. Blanchard, sometime shortly after you came down from Ketchikan, which could have been any time from the 15th to the 20th of April, would that be about your guess? A. Yes.

Q. The Fairbanks-Morse people recommended the removal of the crankshaft? A. Yes.

Q. And were you there when Wilsons were doing the work on the one bearing?

A. No, I was not. [163]

Q. You weren't there when that was done?

A. No.

Q. And that was all completed before you got there?

A. Yes; as I remember, it was done before I got there.

Q. Well, you would know, wouldn't you?

A. I don't remember. I don't remember seeing anybody aboard the boat outside the Fairbanks men.

Q. When you got there the Fairbanks men had already commenced their job; is that it?

A. Well, I just got there that morning, and he more or less, he probably had been down on the boat several hours before I got there, but really hadn't accomplished anything yet.

Q. He hadn't actually started to take the crank-

(Testimony of Mel Blanchard.)

shaft out yet, but he was working around to see how to do it?

A. No. He wasn't figuring on taking the crankshaft out at that time. He was taking off the main bearing caps. I didn't pay much attention to him, but he was going through the motor, more or less of a general inspection.

Q. Was the number five cylinder hung up at that time, or number three?

A. Well, now, I couldn't say about that. I am not sure if it was hung up or what took place there.

Mr. Renfrew: That is all.

Mr. Boochever: No further questions. That is all, Mr. Blanchard. I would like to have the deposition of [164] Mr. Dent, which I believe is on file with the Court. It should be in a sealed envelope, your Honor. I have a copy. I don't assume that it will be necessary to read these, since we don't have a jury trial here, but I request that the answers to the direct interrogatories of Howard A. Dent be introduced in evidence at this time. Do you have a copy?

Mr. Renfrew: No. But if you have one, I would like to have it. Your Honor, I would like to have a moment to go over this. Could we have about three or four minutes recess?

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore; whereupon the trial proceeded as follows:)

Mr. Boochever: I request that the interrogatories and answers to the interrogatories be introduced into evidence at this time. I imagine they can stay right in the file as long as they are marked as introduced.

(Whereupon, the deposition was admitted and marked Plaintiffs' Exhibit No. 22, and it remained in the official file of this cause.)

Mr. Boochever: Plaintiffs rest, your Honor.

Mr. Renfrew: Your Honor, at this time I would like to make a motion for judgment on the basis of the testimony of the plaintiff himself on direct examination. The record will disclose that the plaintiff testified that he had an [165] opportunity to buy this vessel two ways. One, he could buy the vessel for thirty thousand dollars and Mr. Anderson would fix it up; or he could buy it for twenty-five thousand dollars as it was. And the evidence discloses that he did buy the vessel as it was. And if we are to believe the testimony, which I have no doubt is true, he expended more than five thousand dollars in the repair thereof. But he purchased the vessel, your Honor, in the alternative. He had an opportunity to buy it either way, and obviously he chose the twenty-five-thousand-dollar price feeling that he could gain something by perhaps having it repaired himself, which is borne out from the fact that the repairs weren't done in the place where the vessel was at all. Now, your Honor, the same question was propounded to him on cross-examination, and he made the same answer. Now,

I submit, your Honor, on the strength of the plaintiff's testimony, that there is no ground here for any implied warning coupled with the fact that the written instrument of agreement for sale sets forth no implied warnings and in fact states that the only thing that is stated in the contract, your Honor, as the purchase price, the terms, and Article 6: "It is further agreed that provisional delivery of said boat shall be given to the Second Parties this date, and that the Second Parties shall be responsible for said boat to the extent of the agreed purchase price after this date." There isn't a warranty or anything stated in it at all. [166]

Mr. Boochever: Your Honor, I believe that the testimony of the plaintiff, taken as a whole, indicates clearly that he bought this vessel on the representations made by the defendant and that was the basis of the purchase, and he bought it with the understanding that there were two damages to be repaired and the rest of the vessel was in first-class condition and was not leaking, and had only a slightly bruised forefoot and the one crankpin that was scored. Now, it is true he did state he bought the vessel for twenty-five thousand dollars for him to do the repairs, and he bought it with the understanding that that would be all that would be necessary in accordance with the representations made and relying on those representations, and we submit it very clearly makes out a cause of action under the uniform sales law in the Territory of Alaska and the State of Washington.

The Court: You take the view that a warranty

does not have to be included in the written contract itself?

Mr. Boochever: No, your Honor, there was nothing stated in the written contract regarding warranty one way or the other. The written contract does not state it was sold as it, where is.

Mr. Renfrew: By the same token, there is not a thing in the written contract implying any warranty whatsoever, and coupled with all of the testimony, as Mr. Boochever states, we should consider this. Your Honor will recall that this [167] witness is a man of many, many years' experience in purchasing of vessels and owned several of them for many, many years, and if he expected to have any warranty, certainly with his vast experience and having this paper arranged with his own counsel, he would have had that put right in the contract.

The Court: The question is not what he would have done, but whether it has to be in the contract. Of course, there is an implied warranty under our law.

Mr. Boochever: If I may say one other thing, your Honor. It is well accepted that parol evidence may come into evidence with regard to warranty where the contract is silent. It is only if the contract mentions the subject that then you are bound by the contract where no other evidence is acceptable. The evidence has been clear in this case that there were representations, affirmation of facts. 29-1-42 of our A.C.L.A., which constitutes express warranty as well as implied warranty under our

Code, and I think certainly there has been a cause of action made out.

The Court: I will reserve ruling on it. You may proceed. [168]

Defendants' Case

GEORGE HENRY SAINDON

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Will you please state your full name, Mr. Saindon? A. George Henry Saindon.

Q. What is your occupation?

A. I am a land locator.

Q. Have you ever at any time worked for Captain Anderson? A. I have.

Q. And did you work on what is known as the TP 100? A. I did.

Q. In what capacity? A. As engineer.

Q. Had you had previous experience as an engineer? A. I have.

Q. How many years? A. Not many.

Q. When did you first sign on the TP 100?

A. In about January 3, of 1947.

Q. And how long were you with the vessel?

A. I was with them up until about the 1st of April of 1947.

Q. And during that winter from January 3rd on, where was the vessel? [169]

(Testimony of George Henry Saindon.)

A. From January 3rd until February 10, 1947, it was laying on the hook in the harbor of Seldovia, and I was on it as a watchman there, and the only man aboard. It was laying at anchor.

Q. You were the watchman. Were you living aboard the boat?

A. I was living aboard the boat continuously.

Q. Do you have any knowledge whether the batteries were in good condition or not by virtue of living on it?

A. I do have that knowledge, yes, in that I used the lights whenever necessary, and I also ran the auxiliary occasionally to keep the batteries charged up, and I used the lights for that period of time, from January 3rd until the day we left Seldovia for Seattle on February 10, 1947.

Q. And now, was there anything wrong with the boat when you started for Seattle?

A. Yes, there was.

Q. What was wrong with it?

A. They had a bad con-rod bearing in the number three, attached to the number three piston. When I first went aboard the boat, Anderson had told me prior to that time his engineer, Norman Nelson, who lived in Tacoma, who had been on the boat for quite some time as engineer, but did not want to make the Seattle trip—that is how I come to go. He told me that they had a bad bearing in number three.

Q. Was anything done before your leaving Sel-

(Testimony of George Henry Saindon.)

dovia with regard [170] to the number three piston?

A. Yes, there was. On the morning of February 10th I had wired for another engineer at Homer to meet us at the Homer dock and we would be over to pick him up on the morning of February 10th, and we made the trip over there. Jack and I and a couple or two deck hands left Seldovia and went to Homer, and that bearing did run a little warm, so, while we were waiting for the engineer to come down there to go aboard to make the Seattle trip with us, Jack and I talked it over, and I said, "It would be a good idea if we disconnected that con-rod bearing and shove the piston on up and go out on five cylinders," which we did.

Q. Then, as I understand it, the entire run to Seattle was made with that bearing——

A. That is right.

Q. That got hot going from Seldovia to Homer?

A. It wasn't hot. It wasn't what you would term hot, but it was warm, and I knew if we attempted to go to Seattle with it we might get in a storm, and we couldn't disconnect if it we were in heavy weather, and that was the safe thing to do.

Q. How much of a run is it from Seldovia to Homer?

A. Just about a two hours' run round trip.

Q. That is the distance it ran after you found the condition? [171] A. That is right.

(Testimony of George Henry Saindon.)

Q. Did anything happen on the trip to Seattle, anything other than just the ordinary?

A. Yes, it did. We were traveling in company with the Lois Anderson power scow, and Junior Anderson was skipper of it, and in fair weather we would attach a towline on the power scow because we had a faster boat. Even with five cylinders we could travel faster than the power scow. In the Gulf there was heavy weather, and we cut loose and let him take it on his own. When we arrived at Cape Spencer, from Seldovia to Seattle, there was exceptionally bad weather, heavy seas and blinding snowstorms, and we couldn't make an entrance, so we laid out there all night, or in fact we ran back and forth or in circles until we got daylight and we could see to get in at the Spencer Light. And that following evening I was on watch. I was on from six to twelve—that is the late watch—and just shortly before I was to go off watch I got a bell from the pilothouse for full astern.

The Court: Is all this narrative leading up to the fact that you hit a log?

A. No. We hit a rock, I believe.

The Court: Then just say that you hit a rock. These other details leading up to it are unimportant.

A. All right. We hit a submerged reef or rock, as I took it [172] to be, and then we went from there to—we sustained some damage there, all right. We hit it, and I immediately then looked to see

(Testimony of George Henry Saindon.)

if she was leaking. Our pumps were ready in case of need, and there was no water coming in, and the skipper came down into the engine room and said, "We are going to Funter Bay," which was three or four miles distance from where we were at the time when we hit this sunken rock or reef. We went over in Funter Bay, and from there we proceeded to Juneau.

(Whereupon, the trial was recessed until 2:00 o'clock p.m., March 9, 1951, reconvening as per recess, with all parties present as heretofore; whereupon, the witness, George Henry Saindon, resumed the witness stand, and the direct examination by Mr. Renfrew was continued as follows:)

Q. As I recall, Mr. Saindon, your last testimony was that the vessel struck a submerged log or rock or some obstruction, and that you made some temporary examination and then proceeded into some bay. A. Funter Bay.

Q. What occurred then?

A. Well, we dropped the hook there and laid there until daylight and then proceeded from there to Juneau.

Q. Did you make any examination?

A. As soon as we could; yes.

Q. And was the boat leaking? [173]

A. No, it wasn't.

Q. Did you have to use the pumps between there and Seattle at all? A. No, we did not.

(Testimony of George Henry Saindon.)

Q. Did the boat leak at all between there and Seattle? A. No, it didn't.

Q. And you made a normal trip from there on down? A. We did.

Q. Now, did you have any trouble with the engine going down as it was running on five cylinders? A. No, we did not.

Q. Did the boat seem to run normally all the way? A. Yes, it did.

Q. And I believe you stated this morning that part of the time you were towing the power scow?

A. That is right.

Q. Now, did that necessitate the use of the towing with? A. It did.

Q. And you were in court this morning and heard Mr. Blanchard, I believe, testify about they were overhauling the winch on the back end of the boat; it froze up or something?

A. I recall that.

Q. Would that be the same winch that you would have to use if you did any towing?

A. The identical winch. It was the only tow winch we had [174] aboard.

Q. And was it in good order?

A. It was in good order.

Q. And you used it on more than one occasion on the way down from Alaska? A. We did.

Q. Now, you heard some testimony this morning about a by-pass of an oil line? A. Yes, I did.

Q. Now, you were acting as engineer. By the

(Testimony of George Henry Saindon.)

way, have you had previous experience with diesel engines?

A. I don't have a license, but I have had experience with diesel engines.

Q. You have torn them down and put them back together? A. That is right.

Q. Where did you do that work?

A. I did it for the Army Engineers here in Alaska.

Q. Was that just a short time previous to this year, or to 1947?

A. In 1945. 1944, 1943, 1944, 1945. I was with the Army here for five years.

Q. And you had considerable experience with diesels at that time? A. That is right.

Mr. Boochever: I object to that as [175] leading.

Mr. Renfrew: What is leading?

Mr. Boochever: You were telling the witness what to testify; that is what is leading about it.

The Court: Well, it was leading, but——

Mr. Renfrew: I meant to say, "And did you have." Excuse me, Counsel.

Q. Will you explain, Mr. Saindon, what, if anything, was done in connection with the by-passing of the oil lines as Mr. Blanchard testified?

A. When we decided to make the trip on five cylinders rather than six as would be normal, we had to take preventive measures to keep from feeding our diesel fuel into that dead cylinder head, so

(Testimony of George Henry Saindon.)

I did put a plate in there to stop the fuel from going into the dead cylinder.

Q. Would that have any effect at all on the actual oiling of the crankshaft?

A. No. That is diesel fuel oil, diesel fuel, but it had no effect on the lubrication.

Q. Was anything done to affect the normal lubrication of the crankshaft bearings?

A. No.

Q. Could you state the number of days you were en route coming south?

A. Approximately ten days.

Q. And how about continuous running [176] hours?

A. Well, we ran about three days, is about the longest continuous running time, I believe.

Q. How many hours would that be?

A. Well, it would be seventy-two hours.

Q. And did the vessel run normally all of that time? A. It did.

Q. Now, were you by any chance present on the vessel when it was docked at Seattle when Mr. Anderson, the owner, was negotiating with anyone for the purchase of the vessel?

A. Yes, I was.

Q. Were you—did you ever see any men come aboard and go over the crankshaft and mike it?

A. Yes, they did. They came down in the engine room.

Q. And do you know whether or not that was before Mr. Owens came aboard?

(Testimony of George Henry Saindon.)

A. Yes. I had a friend down there myself and looked it over, a Diesel man.

Q. And were you there when Mr. Owens came aboard? A. Yes, I was.

Q. Did you hear any conversation between Mr. Owens and Captain Anderson?

A. Yes, I did.

Q. Well, state what, if any, conversation you overheard between them?

A. During that time Mr. Owens was there talking with [177] Captain Jack Anderson. Anderson told him about the shaft and also about the injury to the forefoot, and he also mentioned about—although I don't think Anderson knew it would be necessary to take the shaft out—but he did mention about removing the stack and taking it out through there rather than taking it aft.

Q. You heard that part of the conversation about removing the shaft? What was that? What was the program for removal of that shaft?

A. The program as used, or as Anderson suggested?

Q. As discussed between Anderson and Owens, if you heard that conversation.

A. Well, there was nothing said about taking it out aft. It was just that it could be removed that way.

Q. What way?

A. By taking it out by removing the stack and taking it up topside. It would be amidships rather than out through the cargo hold.

(Testimony of George Henry Saindon.)

Q. That is the only actual part of the conversation that you heard then?

A. Well, no. They were talking also about the sale, well, about the price of it and not so much about how the payments would be. But I did know beforehand that Anderson had told me he had a couple buyers——

Mr. Boochever: I object to what he knew [178] beforehand.

Q. I am only interested in what you heard of the conversation now between Mr. Anderson and Mr. Owens, just what you heard; if you didn't——

A. About the price—the price, too, was spoken of, as twenty-five thousand dollars as she sits, as is, and Anderson also said that twenty-five thousand dollars as she sits, and thirty thousand dollars if he fixed it up.

Q. If Anderson fixed it up? A. Yes.

Mr. Renfrew: I think that is all. Your witness.

Cross-Examination

By Mr. Boochever:

Q. Now, you say you worked for the Army there around diesel engines? A. Yes, I did.

Q. And when was that?

A. I worked five years, from the spring of 1940 up until late 1945.

Q. And what was your exact job?

A. General rigger foreman.

Q. In charge of what?

(Testimony of George Henry Saindon.)

A. In charge of the placing and setting of all heavy equipment, such as motors, generators, dynamos, oilers, stem rigs. [179]

Q. Where?

A. Out of Fairbanks, along the Alcan, as far south as Northway, and at Fort Richardson and on the Kenai Peninsula.

Q. Not in regard to boats, then?

A. Some was boat work, yes; and some was powerhouse installations.

Q. You have never held boat papers, though?

A. No, I haven't. I hold seaman's papers, is all, in boats—Coast and Geodetic.

Q. Now, how long had the vessel been on the hook at Seldovia prior to February 10th, Mr. Saindon?

A. That I couldn't tell you exactly, because I wasn't at Seldovia. The last time I saw her was possibly sometime in September at Homer.

Q. At Homer? A. At Homer.

Q. And when did you go over to the vessel at Seldovia? A. January 3rd.

Q. And it was there at Seldovia from January 3rd to February 10th? A. That is right.

Q. Now, you said that on your way down south with the vessel that you were towing the scow; is that correct? A. We were.

Q. Normally, when you are towing a vessel you make an entry [180] to that effect in a logbook, don't you?

A. Well, I don't know. I was in the engine

(Testimony of George Henry Saindon.)

room. That I couldn't tell you. I have never held a deck job as a deck officer.

Q. Are you sure that you were towing the scow and the scow wasn't towing you part of the way?

A. I am definitely sure of that. We towed the scow. The scow couldn't tow us.

Q. Now, where did you run into that rock? What rock was that?

A. I couldn't tell you the name of the rock, but I can tell you about where it was.

Q. Where?

A. It was three or four miles west of Funter Bay.

Q. That is Couverden Rock, isn't it?

A. That I couldn't tell you. I don't know.

Q. You ran right head-on into that rock; isn't that correct?

A. Well, I wouldn't say head-on, because I was in the engine room. I wasn't handling the courses of the ship.

Q. Now, you say the vessel didn't leak after that. Did you look in the front watertight compartment? A. I did.

Q. Yourself? A. That is right.

Q. And there was no water in there at all? [181]

A. Sure, there was water in there. There is always a little water in there.

Q. What you mean is, there was no water beyond the watertight compartment in the rest of the vessel; is that right? A. That is right.

(Testimony of George Henry Saindon.)

Q. And that is what you meant when you said it wasn't leaking? A. That is right.

Q. Now, you said you had no trouble with the engine all the way down; is that correct, other than this one bearing that was hung up?

A. That is correct.

Q. And when you got down there the engine apparently was in good condition except for that one bearing; is that right?

A. That is right, as far as I know.

Q. Well, then you were present, you say, when Mr. Anderson talked to Mr. Owens down there?

A. That is right; I was aboard the boat.

Q. Were you there when——

A. I was in the engine room.

Q. And you were right there when——

A. I was in the engine room when they were down there inspecting the boat.

Q. And you were——

Mr. Renfrew: Just a minute. I can't hear both of you at once. Now, I think the witness should be given a chance [182] to give an answer before counsel asks another question.

Mr. Boochever: I don't mean to interrupt you.

A. That is all right.

Q. Were you right down there with them when they were talking? A. Yes, I was.

Q. Just the three of you there?

A. That is right.

Q. And did you participate in the conversation?

A. No, I did not.

(Testimony of George Henry Saindon.)

Q. You just stood by and were listening; is that right?

A. If I was to be asked any question as to the performance of the motor, I could tell them how she performed on the way down. That was the only reason I was there.

Q. No one asked you any questions about it; is that right?

A. Yes, there were some questions, a few questions asked.

Q. What questions were asked about the performance of the motor?

A. The questions asked were if it slowed us down or if we had any other trouble with the motor, if it gave any other trouble.

Q. And what did you answer?

A. I answered that it didn't.

Q. Now, did you hear Mr. Anderson tell Mr. Owens that, aside from that one bearing, the engine was in good condition? A. Yes, I did. [183]

Q. And did you hear him tell him that the vessel wasn't leaking? A. Yes, I did.

Q. And did you hear him tell him that they had struck a log on the way down and slightly bruised the forefoot, but that otherwise it was in good condition?

A. I don't recall that he said "slightly." He said that he had damaged the forefoot.

Q. Well, that they had hit a log on the way down?

(Testimony of George Henry Saindon.)

A. I don't know about the log deal. He couldn't have said that because, to me, it was no log.

Q. Well, I am not asking what it could have been. Was there anything else said at that conversation? A. Only about the price.

Q. And that is all?

A. That is as far as I know; yes.

Mr. Boochever: That is all.

Redirect Examination

By Mr. Renfrew:

Q. Just a moment, Mr. Saindon. I want to ask one or two questions. Did I understand you to say there was always water in this bulkhead that is right behind the stem or the forefoot?

A. I won't say that there is always water. I did make a [184] statement that there would always be water in there, because it is a wood boat and there is always a rack to it when she springs.

Q. You did examine that after this collision with this submerged object?

A. I didn't that night. We went out around the bow with a dory and took a look at it, and if there was any leakage of any amount it would show back of the bulkhead, even it would show back of the bulkhead under the auxiliary motor.

Q. And you saw absolutely no evidence of that?

A. That is right.

Q. And did you check it periodically from then on to see? A. We did.

(Testimony of George Henry Saindon.)

Q. And you never pumped it once?

A. Yes, we pumped it.

Q. When did you pump it?

A. We pumped it at Ketchikan, not because of a leak, but because you pump your bilge occasionally, anyway.

Q. After you pumped it at Ketchikan, did you pump it again? A. No.

Q. Did you get any appreciable amount of water out of it, any more than you ordinarily get from a bilge? A. No.

Q. In Ketchikan?

A. That is right. And we never pumped it in Seattle while [185] she laid there.

Q. Now, you mentioned that in your opinion that you hit a rock. Is that what Captain Anderson said, or is that what you thought?

A. That is what I thought.

Q. Did he stop the vessel and back it up?

A. That is right.

Q. Is that the procedure when you hit anything in the sea?

A. Either back up or else you continue going ahead. If it is a nice shelf and you are badly hurt, you can shove your nose up on it and maybe save you from sinking, and then you have got to hang on rather than back away. But it was at night, and I wasn't on deck, of course.

Mr. Renfrew: That is all.

(Testimony of George Henry Saindon.)

Recross-Examination

By Mr. Boochever:

Q. A few more questions. A. OK.

Q. Now, when you were pumping this out at Ketchikan, you didn't pump it dry, of course?

A. Naturally not.

Q. Now, when you went into the rock and, you said, you backed off, could you feel it come off?

A. Could I feel it come off? [186]

Q. Yes.

A. No, I couldn't feel it come off, but I knew we were afloat. I could feel the movement of the ship.

Q. Now, when you hit that, it was quite a definite collision there, wasn't there? You came to a full stop? A. That is right.

Q. Now, in regard to—when you got down to Ketchikan, how long did you stay with the boat?

A. When we got to Ketchikan?

Q. When you got to Seattle, I mean?

A. I was on the boat up until about the latter part of March.

Q. And where was it that you took the boat up on drydock?

A. We didn't take it up on drydock.

Q. You don't remember that?

A. It isn't that I don't remember, but all the time that I was aboard the boat she never went on drydock.

Mr. Boochever: That is all.

Mr. Renfrew: That is all, Mr. Saindon. Call Mr. Owens for a question or two, please.

ALMON E. OWENS

called as a witness on behalf of the defendants, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Mr. Owens, so we get one matter straight here—did Captain [187] Anderson tell you this vessel hit a log or a rock?

A. He told me it hit a log.

Q. Definitely? A. Definitely.

Q. It couldn't possibly be any rock?

A. He didn't mention a rock at all. He said he hit a log and bruised the forefoot slightly.

Q. And was anyone there when he told you that?

A. Mr. Dent was with me when he told me once.

Mr. Renfrew: May I have the deposition of Mr. Dent, please?

Q. Now, if Mr. Dent was there, I wonder if you could know why in answer to this Mr. Dent would make this reply in his deposition referring to a conversation that took place between you and Mr. Anderson in his presence: "The conversation took place on the boat mentioned and as they were interested in disposing of the boat and Owens needed it for his logging business he was endeavoring to buy the boat and in going over it he was advised that it had just returned from Alaska and was in good shape except that they had hit a log or rock

(Testimony of Almon E. Owens.)

and that it might need some minor repairs there and while the engine did not run Anderson advised us that with the exception of one bearing the engine was in first class shape and that for the sum of not to exceed $5,000.00 the boat could be put in [188] first class condition." Why do you suppose Mr. Dent got the idea that it might have hit a rock?

Mr. Boochever: I object to that as calling for a supposition of what another man believes. The deposition speaks for itself.

The Court: I should think it would be difficult for him to tell why somebody else supposed it was a rock.

Q. Well, Mr. Dent was there, as you stated, when that conversation took place, wasn't he?

A. Mr. Dent was on the boat with me and he talked with Mr. Anderson personally.

Q. Didn't you just answer to my question before I read that deposition that Mr. Dent was there when you had this conversation with Captain Anderson about hitting this log?

A. Without a doubt I talked with Mr. Anderson, but also Mr. Dent did the same thing.

Q. Well, now your explanation is that he may have told "rock" to Mr. Dent when you weren't listening, but to you he said "log"?

A. No. I was there all the time. I heard what was said.

Mr. Renfrew: That is all.

(Testimony of Almon E. Owens.)

Cross-Examination

By Mr. Boochever:

Q. Mr. Owens, by that deposition there does that mean, to [189] you does that mean according to Mr. Dent that Mr. Anderson didn't say that it hit a log on the way down?

Mr. Renfrew: Now, if you want argument, your Honor—I object to that.

Mr. Boochever: That is the same kind of question counsel was asking, I admit. I want a second here to see if I can locate a document. I am sorry to take up your Honor's time on this but I want to find this exhibit in here.

Mr. Renfrew: I can't understand why counsel would cross-examine on exhibits.

The Court: Didn't you call him as your own witness?

Mr. Renfrew: Yes, I did.

The Court: Then this is cross-examination.

Mr. Renfrew: But it is limited to the questions I asked him.

The Court: Well, what question are you going to ask?

Mr. Boochever: I don't know why counsel is assuming that I am going to ask about something else.

Mr. Renfrew: I was wondering what he was looking for that it takes so long.

Q. I show you a letter which is unsigned and shows on it that it is a carbon copy, and ask you

(Testimony of Almon E. Owens.)

if you have ever seen the original of that letter, original signed copy of it?

A. Yes, I have. [190]

Q. What is that a copy of?

A. A copy of a letter to Mr. Orville Mills.

Q. From whom? A. From Mr. Dent.

Q. And did you recognize the original signature on that? A. I received the original letter.

Q. With Mr. Dent's signature on it?

A. Yes.

Q. And what was the date of that letter?

A. March 12, 1949.

Q. Now, I am going to ask, do you have the original signed copy of the letter?

A. Not with me.

Mr. Boochever: I am going to ask to introduce this into evidence in regard to cross-examination.

Mr. Renfrew: Your Honor, conceivably it would be nothing but self-serving and hearsay, a letter from Mr. Dent to the witness.

The Court: To which witness?

Mr. Renfrew: The witness on the witness stand.

Mr. Boochever: To Mr. Mills, his attorney.

Mr. Renfrew: Or Mr. Mills, his attorney. A letter from Mr. Dent to this man's attorney, how could that be anything but a self-serving declaration and hearsay.

Mr. Boochever: Well, obviously it is not [191] self-serving because it isn't Mr. Owens or Mr. Mills that has written the letter. It is from Mr. Dent and it is in regard to the allegation as to what was

(Testimony of Almon E. Owens.)

heard and it was written at a time earlier than the deposition.

Mr. Renfrew: Are you trying to impeach your own witness' deposition?

Mr. Boochever: No, I am not. I am trying to clarify it. He said that Mr. Anderson said "a log or a rock." I am trying to clarify it by an earlier statement.

Mr. Renfrew: Well, your Honor, I object to any further discussion on this matter even by inference from counsel that he could prove it. He doesn't even have a signed letter here. He has a typewritten sheet which purports to be typed from a letter which went from Mr. Dent, as he says, to this man's counsel, and this man says, "Yes, I saw that letter."

Mr. Boochever: Now, we have copies. He had a signed copy.

The Court: The purpose is to show, as I understand it, that Dent made a statement consistent with this witness' testimony?

Mr. Boochever: That is correct, your Honor; at an earlier date than the deposition, and the deposition, I maintain, is not inconsistent. It just gives an alternative as to what the conversation was, and this explains at an earlier [192] date, shows that it is consistent with Mr. Owens' testimony.

The Court: Well, of course, the rule is that before you can corroborate a witness' testimony by showing the statements made prior to the suit consistent with the testimony, you have got to show

(Testimony of Almon E. Owens.)

that the witness'—and that would be Dent—credibility had been attacked in that respect. Have we a situation like that here? I don't think we have.

Mr. Boochever: Well, we have a situation where Mr. Dent's credibility is attacked to an extent, either his or Mr. Owens', one or the other. It could be regarded as either way. As it is, Mr. Dent stated that it was "a log or a rock." Now, of course I maintain that it isn't really inconsistent, but that was the purpose of calling Mr. Owens on the stand, to bring out that inconsistency which isn't attacked at least indirectly on the credibility of Mr. Dent. It could be regarded as either the credibility of Mr. Dent or Mr. Owens, and I think this clarifies it and explains it.

Mr. Renfrew: It seems pretty far fetched to me, your Honor, to claim that I am attacking the credibility of a deposition of a witness who is sworn under oath and gives testimony here. I am merely showing the inconsistency between that testimony which the plaintiff has introduced and the testimony of the plaintiff.

Mr. Boochever: If showing inconsistency isn't attacking credibility, then I don't know what it is. It certainly is showing that one or the other is either mistaken or [193] unreliable on his testimony.

The Court: Well, it seems to me that the rule further contemplates that the corroborating testimony consisting of prior consistent statements would have to be given by the witness whose credi-

(Testimony of Almon E. Owens.)

bility is attacked, would it not? For instance, assuming that it is Dent's credibility that has been attacked here and you want to rehabilitate him by showing that at a time that he could have no motive therefor he made statements consistent with his testimony, it would have to be Dent that would have to get on the stand and testify to those statements, wouldn't it?

Mr. Boochever: No, I don't believe that that would be correct, your Honor, because suppose, for instance, that Dent—we are assuming now that his credibility is being attacked here, and he submitted a deposition, and his testimony is a later fabrication. Well, now, a statement made by Dent immediately after the collision to the same effect could come into evidence; a statement made to Mr. Owens or anyone else could come into evidence and naturally is an exception to the hearsay rule to substantiate credibility in that instance, and Mr. Dent wouldn't be the one to testify to a prior statement even if he could. That is the rule on the exception.

The Court: You mean, if you could produce somebody else who heard it?

Mr. Boochever: That is right. Now, here I have got [194] a prior statement of Mr. Dent's on this matter to clarify it.

Mr. Renfrew: I take issue with counsel in that case. He has no prior statement, and it isn't the best evidence, and I take issue with the very premise of the argument that I am attacking the credibility of Mr. Dent. I submit that I am not attacking Mr.

(Testimony of Almon E. Owens.)

Dent's credibility at all. I am trying to refresh this man's memory as to what was said at that time and for no other purpose.

Mr. Boochever: Well, of counsel can state what his purpose is, and of course he can state it any way he wants, but the fact is that he is trying to show an inconsistency between the two, which may be regarded as an attack on the credibility of either one or both.

The Court: Well, in view of his statement he certainly is precluded now from making any attack on the credibility of Dent in that particular.

Mr. Boochever: Well, I mean he can't take his choice on saying that they are inconsistent, "I am attacking Mr. Owens' credibility," when his actions are what counts, your Honor, and he has attacked the credibilty of either or both.

The Court: Well, but my point is, if he is precluded from attacking the credibilty of Dent in his argument, then what purpose would be served by allowing this to go in?

Mr. Boochever: Because, your Honor, in my opinion [195] he is attacking the credibilty of either one of these men, and we are entitled to show which is correct and to show the prior statement on the point to prove it.

The Court: Now, that is a copy of a letter written by Dent?

Mr. Boochever: That is right.

The Court: Well, where is the original?

Mr. Boochever: The original, he says he hasn't

(Testimony of Almon E. Owens.)

got, and I don't believe I have a signed copy in my file, just this unsigned copy. I don't know where the original is.

The Court: Well, you mean it is here somewhere but you don't know where it is?

Mr. Boochever: No. I don't believe I have it, your Honor, and I don't know whether anyone does; possibly Mr. Mills might. He sent me all of his files supposedly, and I don't know why the original isn't here. If your Honor wants, I could request a continuance to get this since we are going to have a continuance at the end of the trial anyway. I could get the original copy from Mr. Mills, if he has it, but I don't know where it is now. Mr. Owens received a copy and he doesn't know where it is.

Mr. Renfrew: The mere production of something, your Honor, doesn't prove that it is the original. Just a letter signed by someone who calls himself Dent doesn't mean a thing. It would have to be identified. [196]

Mr. Boochever: Well, possibly we could produce that with Mr. Mills' testimony.

Mr. Renfrew: Now, your Honor, the only purpose for introduction of that kind of evidence is to explain the statement made by Mr. Dent, their witness. Now, that is the only reason for it. It can't be any other. It can't bolster or lower this man's testimony one bit. He states emphatically that Captain Anderson told him that he hit a log and nothing else. Now, that is his testimony. Now, Mr. Dent

(Testimony of Almon E. Owens.)

comes in here with a sworn statement and deposition taken by the plaintiff in the action and he said Captain Anderson said that he either hit a log or a rock; he didn't know which. Now, my point is that it doesn't make any difference what Mr. Dent said at some other time. It can't do anything but clarify Mr. Dent's statement. It doesn't do a thing to affect his testimony because he has sworn that Anderson didn't say anything but that they hit a log. Period. Now, that is all there is to it.

Mr. Boochever: Your Honor, the purpose of bringing this man on the stand was either to impeach himself or to impeach Mr. Dent or both of them, to show an inconsistency, and he was asked specifically—the question that was asked him was whether Mr. Dent was present with him and whether that was the only representation in the presence of both of them as to the striking of this log or rock. Mr. Owens testified that [197] it was a rock that was stricken. Well, now, that is according to counsel's theory, but I don't agree with his theory, I admit, but according to his theory it is inconsistent with Mr. Dent's prior testimony, and it goes to impeach Mr. Den't testimony, and a showing of a prior statement of Mr. Dent to clarify it could come in.

The Court: Well, it isn't clear yet to me; what was it that Dent testified to in his deposition?

Mr. Boochever: He stated that Mr. Anderson stated that he hit a log or a rock on the way down, which could be interpreted to mean that those were the exact words or it could be interpreted to mean

(Testimony of Almon E. Owens.)

that he hit a log or he may have said he hit a rock; Mr. Dent wasn't certain.

The Court: And this is for the purpose of showing that at an earlier time he made the same statement?

Mr. Boochever: No. The earlier time he stated definitely that it was a log.

The Court: That Dent said that?

Mr. Boochever: Yes.

Mr. Renfrew: How are you going to show that? Now we are down to where you might as well show the Court the letter now and take the stand and swear that you know that that is the letter from Mr. Dent.

Mr. Boochever: Well, I have already had the witness swear that he knows that it is a true copy of a letter from [198] Mr. Dent.

The Court: Well, but from what you say it would appear that Dent testified in his deposition that he was told by one of the defendants that the boat hit a log or rock?

Mr. Boochever: Yes, your Honor.

The Court: And this would put into evidence the statement of his on a previous occasion that what the defendant said was a rock?

Mr. Boochever: Was a log, your Honor.

The Court: Well, I thought it was for the purpose of corroborating the witness Dent's testimony, but this would seem to do nothing but show that at an earlier time he made a——

(Testimony of Almon E. Owens.)

Mr. Renfrew: A different statement.

The Court: Yes.

Mr. Renfrew: And now he is trying to impeach his own witness.

Mr. Boochever: I am not doing that, your Honor. I am trying to accredit him. He said at this later date that Mr. Anderson said a log or a rock. In other words, he couldn't remember which, and at the earlier date he stated a log, and that is what I am trying to do, to establish it, which is consistent with what Mr. Owens has testified.

The Court: Well, it wouldn't be for the purpose then of corroborating Dent, but of corroborating the witness [199] on the stand?

Mr. Boochever: Well, it would be accrediting Dent's testimony, explaining it.

Mr. Renfrew: Well, counsel takes the opinion apparently, your Honor, that the witness Dent here didn't know whether Anderson said log or rock, and I read this entirely different. The conversation as this reads, your Honor, it says: "The conversation took place on the boat mentioned and as they were interested in disposing of the boat and Owens neded it for his logging business he was endeavoring to buy the boat and in going over it he was advised that it had just returned from Alaska and was in good shape except that they had hit a log or rock and that it might need some minor repairs." Now, the word intimates that Anderson said, "We hit something. I don't know what we hit—a log or a rock—coming down, and the forefoot is damaged

(Testimony of Almon E. Owens.)

and we need some repair." Now, apparently counsel takes the position that what this witness meant to say was, "Anderson said, 'We hit a log,' or else Anderson said, 'We hit a rock'; I don't know which he said." Well, I don't interpret this that way at all, and that is a matter of argument.

Mr. Boochever: Well, that is why I want to accredit Mr. Dent's testimony with his earlier statement to show which is correct and what the earlier facts were in the matter.

The Court: Well, do you mean on the theory that [200] being earlier in time it would be presumed that his recollection would be clearer on it?

Mr. Boochever: That is right, your Honor.

Mr. Renfrew: Before your Honor rules, if you are contemplating at all letting this go into evidence, I would like to have an express statement from the Court under what theory a written piece of paper addressed to someone in typewriting with a signature typed thereon can be identified by a third person as a true copy of an original not even addressed to him, and how it could be competent evidence in any kind of proceeding in the world. I can't think of a situation.

The Court: Well, would it differ from an oral statement that is attempted to be introduced to corroborate a witness?

Mr. Renfrew: I beg your pardon, sir?

The Court: How would it differ from an oral statement? Suppose that——

(Testimony of Almon E. Owens.)

Mr. Renfrew: It isn't any statement at all. It is absolutely nothing. It isn't anything.

The Court: Why not?

Mr. Renfrew: Your Honor, how can it be anything? It is a typed piece of paper. Supposing I went out in the other room and typed something up and brought it in here and offered it in evidence——

The Court: You mean it hasn't been [201] authenticated yet by this witness?

Mr. Renfrew: Certainly not; it couldn't be authenticated with him; it isn't written by him, or it isn't addressed to him.

The Court: By whom is it signed?

Mr. Boochever: It is a typewritten letter signed by H. A. Dent in typewriting on this copy, but the witness has stated he has seen the original signed copy. According to counsel's argument you could never introduce secondary evidence, and that is almost elementary that you can introduce secondary evidence when you can't produce the original to testify on it.

Mr. Renfrew: Well, your Honor, certainly you can introduce secondary evidence. I am not quite so naive as that, counselor. But you can't introduce evidence addressed to a third person by a fictitious first person and then ask the witness has he ever seen the original thereof. He says, "Why, yes, I have seen the original. I remember seeing the original," and so, well, now this must be a copy of it. If he saw the original and he knows the content of it, have him write it in his own handwriting. If he

(Testimony of Almon E. Owens.)

can produce the copy of that in his own handwriting, I will submit to its admission.

Mr. Boochever: I don't follow you. Submit what copy of what?

Mr. Renfrew: He doesn't know the content of that [202] letter.

Mr. Boochever: He has looked at it and he knows the content of it.

Mr. Renfrew: That is the only reason he knows it, is what he has seen on the witness stand. The letter wasn't addressed to him.

Mr. Boochever: I don't want to engage in an argument with you, Mr. Renfrew, but he stated that he recognized the letter, and that he received a carbon copy as indicated on it, that was signed; and an original of it, he doesn't have it.

Mr. Renfrew: If he received a carbon copy, your Honor, that wouldn't be competent unless it was signed. I might make up a paper and send it to him as a carbon copy.

Mr. Boochever: Your Honor, I will do this in order to get this thing moving. If counsel will agree to taking a further deposition of Mr. Dent and questioning him about this matter, I will agree to that and waive my request at this time to introduce this letter.

The Court: Well, did he say that—it isn't clear to me whether the witness said that he saw the original or merely a carbon copy.

Q. Mr. Owens, will you look at this letter again,

(Testimony of Almon E. Owens.)

please? Now, did you see the original of that letter at any time?

A. I am not positive about that. I received a copy signed by Mr. Dent. [203]

Q. That is exactly—that was identical with that letter? A. That is right.

The Court: Well, I think that the letter would be admissible just the same as an oral statement except that the rule that permits the corroboration or rehabilitation of a witness whose credibility has been attacked by introducing a prior consistent statement is limited to a situation where there has not been merely an attack of this kind but where there has been a serious attack on his credibility, and I don't think there has been any attack of that kind here. In other words, the rule cannot be invoked every time that a witness is contradicted or some inconsistency may develop, so I think that on that ground it would have to be excluded. Upon reflection I recall that it is only where the credibility of a witness is seriously attacked that evidence of prior consistent statements may be received, and I don't think that there is that kind of an attack on the witness Dent.

Mr. Boochever: Well, your Honor, I do think that on one of the later points, I do think that this is one of the material representations in the case, one of the important points in the case, and that on that score it is important that the credibility be shown and the prior statement be introduced in evidence. It is one of the major points and one of the

(Testimony of Almon E. Owens.)

misrepresentations that we rely on, so that it isn't as though it were an immaterial point. [204]

The Court: Well, it isn't immaterial except, as I say, I don't know of anything that would take it out of the rule because it happens to be important. It seems to me that it would have to be more of an attack on the credibility of the witness than merely showing inconsistency of what he said on one occasion and another.

Mr. Boochever: Very well, your Honor. For the record may I make an offer of proof in regard to this letter?

The Court: Yes.

Mr. Boochever: I think the letter for identification may be introduced, too, so as to show what its content was, and by this letter I wish to show that at a prior time to his deposition Mr. Dent stated definitely that Mr. Anderson told Mr. Owens in Mr. Dent's presence that the hull only needed a small repair to the bow where they had hit a log on the way down, and that that statement goes to explain this later statement which has been brought into question by the testimony in regard to Mr. Owens, and it is for that reason that I request that this letter be introduced into evidence.

The Court: Well, of course there is another respect in which the offer of proof fails to comply with the rule, and that is it doesn't show a prior consistent statement but it shows a prior different statement. Now, if the situation, for instance, were this: If the witness, Dent, had been on the stand

(Testimony of Almon E. Owens.)

here and testified in the way he did by deposition and [205] then went back on the stand and corrected his testimony to say that he recalls now that all that was said was that the boat had struck a log, then, if there was an attack made on his credibility in any way, a prior consistent statement, at a time when it was presumed that his recollection was better, would be admissible, but I may be in error in assuming that the attack here on the credibility of the witness, Dent, is not as serious as it must be to warrant introduction of testimony of that kind, but on the other hand the other obstacle, as I see it, to its introduction is that it is not a prior consistent but a prior inconsistent statement.

Mr. Boochever: Your Honor, I also request at this time that while the case is being continued to receive the deposition of Mr. Mills and Mr. Dawe, that we be allowed to secure the deposition of Mr. Dent in rebuttal.

The Court: That may be done.

Mr. Boochever: That is all, Mr. Owens.

Mr. Renfrew: That is all.

GERALD MASON OAKSMITH

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Will you please state your full name?

A. Gerald Mason Oaksmith. [206]

(Testimony of Gerald Mason Oaksmith.)

Q. Where do you reside?

A. I reside in Seattle.

Q. And what is your occupation?

A. My occupation at present is superintendent of the Scow Bay Canning Company at Petersburg, Alaska.

Q. Now, do you own any boats?

A. Right now I have an interest in and own four boats.

Q. Have you had any experience with the type of vessel concerned here, this TP 100?

A. These TP 100s, I have had experience from the time the boats were designed by the Army Engineers in 1941.

Q. What experience have you had?

A. From 1942 to 1944 I was with the Army Transport in Seattle, in charge of repairs and manning and supplies in the small boats and harbor division.

Q. And do you know something of the construction of these TP boats? A. Yes, I do.

Q. Do you have any idea what they cost new; what they cost the Government?

A. Approximately two hundred and fifty thousand dollars.

Q. Do you know when the first ones were made?

A. The first one came out in the——

Mr. Boochever: Your Honor, I object to this. I don't think it is relevant when they first came out, and I [207] also object to the last question and ob-

(Testimony of Gerald Mason Oaksmith.)

ject regarding the cost and move that the last question be stricken as totally immaterial.

The Court: What do you claim for that?

Mr. Renfrew: Well, I think, your Honor, that both of them are material in the first instance, and I would like to show that the boats were built within a comparatively short time. The first one was built just a few years prior to 1947, and this man has that knowledge, and that these boats were built at a cost of several hnudred thousand dollars and, if a person, by inference then, purchased one for twenty-five or thirty thousand dollars, he couldn't expect to have it put in first class shape, such as recoppering the bottom and all of the necessary work that was done on this vessel, at that price. It is clear out of the question.

The Court: Well, if this concerns the reasonable value of the sale price of the boat or if the plaintiff didn't predicate his case upon express warranty, I think your point would be well taken, but since the case is predicated on breach of warranties then it makes no difference what the boat was worth new, how old or how new it was.

Mr. Renfrew: Well, it makes this difference, your Honor, not from what the boat was worth, but to show what reasonable wear and tear would be on a boat from a certain length of time to a certain length of time. I can show that [208] this wasn't an old vessel.

The Court: Well, but they are not claiming here that the cost of repairs was unreasonable. They are

(Testimony of Gerald Mason Oaksmith.)

complaining that the cost of repairs was misrepresented.

Mr. Renfrew: Maybe I can claim that the cost of the repairs was unreasonable, your Honor. I haven't put on my case yet.

The Court: Have you pleaded anything like that?

Mr. Renfrew: I have denied the cost of their repairs.

The Court: Well, you want to show that the cost of repairs was——

Mr. Renfrew: Not only that the cost was clear out of sight, but that there was an agreement to fix the boat for less than five thousand dollars, and that Mr. Anderson even said, "I will fix the boat up if you want to pay thirty thousand dollars," and he had a basis for saying that.

The Court: Well, all right then. You want to show now that the cost that was incurred in repairing the boat was reasonable or unreasonable; which?

Mr. Renfrew: The cost of these people's spending in repairing the boat was absolutely unreasonable. I certainly am going to show that. They took the crankshaft out backwards and had everybody working on it from Ketchikan to Yakima.

The Court: That might be all right if it wasn't for [209] the fact, as I say, of these warranties.

Mr. Renfrew: Then, if the warranty is in question, what did your Honor leave any of the other testimony in at all for? I move to dismiss the case in favor of the defendant here on the ground that

(Testimony of Gerald Mason Oaksmith.)

there isn't any question of warranty because the man testified himself that he could buy it as is for twenty-five thousand, or thirty thousand fixed. But your Honor allowed all this testimony in about the butcher and the cook and the baker and the candlestick maker working on this thing, three and four and five at a time. Now, I have got a right to show that those repairs could have been done for an awful lot less and prove that Jack Anderson could have had the repairs done for five thousand dollars.

The Court: That can be done without showing the price new of the boat, can't it? And furthermore, you complain that this evidence of these various people has gone in, but you didn't object to it.

Mr. Renfrew: I objected to every single one of the items as they came along here, but your Honor let them in. The record will show that.

The Court: You intimated a moment ago that you objected to the witnesses themselves, to their testimony generally. Now, you may have objected to some of the items, that is true, but you didn't object to so many of the items that it would be correct to say that you objected to all the [210] testimony of all these witnesses.

Mr. Renfrew: I haven't said that, your Honor, at all.

The Court: It sounded like it.

Mr. Renfrew: Well, your Honor knows that I didn't do that.

The Court: Well, the unreasonable cost of repairs, I don't see any necessary relation between

(Testimony of Gerald Mason Oaksmith.)

the unreasonable cost of repairs and the initial cost of the boat. Now, it may be that the initial cost of the boat might be relevant on some other issue.

Mr. Renfrew: Well, I don't know what we are arguing about that for. He said the boat cost two hundred and fifty thousand dollars. Now, if your Honor didn't want to hear him, let's strike it. I don't care. It doesn't make any difference to me at all. The next question that I asked him though was the one counsel objected to.

Mr. Boochever: I moved to strike it as irrelevant.

Mr. Renfrew: If the Court wants to strike it, strike it. This is a trial before the Court. I don't care.

The Court: Well, the Court will let it stand because it has some tendency to show the type of boat it was, and I think that is relevant.

Mr. Renfrew: What was the next question I asked?

Mr. Boochever: When all of these boats were built. [211]

Mr. Boochever: And I make objection to that as irrelevant.

The Court: Objection sustained.

Mr. Renfrew: Now, your Honor, I wish to make an offer of proof. I wish to show by this witness that this boat, which cost two hundred and fifty thousand dollars at a minimum, was built a very, very few years, within from 1943 the first one was built, and that this vessel was purchased in 1947,

(Testimony of Gerald Mason Oaksmith.)

and that the usual wear and tear on batteries, winch, and all these other things, the starting generators, starting motors, and all of the other things that have been enumerated here by Mr. Blanchard, couldn't possibly have occurred on a vessel given hard care or given extreme usage during that period of time.

The Court: Well, but if your question had been, when was this boat built, the Court would of course permit it, but when you say, when was this type of boat built, why it wouldn't necessarily prove that this particular boat was built when the first of that type was built, would it?

Mr. Renfrew: No, your Honor, but it would show that this boat wasn't built before the first one was built, and I am willing to take when the first one was built as a starting point.

The Court: Objection overruled.

Mr. Renfrew: You still won't allow that question? [212]

The Court: I said, objection overruled.

Mr. Renfrew: All right.

Q. Now, when was the first boat built like this?

A. In the Spring of 1944 they were completed, the first one.

Q. In the Spring of 1944?

A. That is right.

Q. Now, how long have you been acquainted with Jack Anderson, Mr. Oaksmith?

A. Oh, some six or seven years.

Q. Do you know Mr. Owens? A. Yes, sir.

(Testimony of Gerald Mason Oaksmith.)

Q. Were you acquainted with this TP boat 100?

A. Yes, sir.

Q. And did you ever talk to Mr. Owens about the TP 100? A. Yes, sir.

Q. When? A. In the Spring of 1947.

Q. Do you know the approximate month?

A. Approximately in the month of March.

Q. And where did you have this conversation with him?

A. In my automobile in the front of Pan American Airways Office on Fourth Avenue, in Seattle, Washington.

Q. Now, will you state what the conversation was and who was present and the approximate time?

A. I had driven my younger brother, Stanley Oaksmith, from [213] Ketchikan, to Pan American Airways Office.

The Court: Well, you don't have to say what you did; just say where this conversation was.

A. My brother went into Pan American Airways Office, and he came out with Mr. Owens. He introduced me to Mr. Owens as a logger from Ketchikan, a customer of his Ketchikan Airways Flying Company, who was looking for a tugboat. Mr. Owens stated that he had been looking at one TP boat in Seattle, and was contemplating purchasing it. This TP boat was the TP 100 owned by Jack Anderson. I told Mr. Owens that this tug had all the indications of having a bent crankshaft and that before he bought it he should have it very carefully surveyed because of this possible fault. I told him that

(Testimony of Gerald Mason Oaksmith.)

the tug had burned out a bearing when the Army declared it surplus at Seward. She was tied up with a burned out bearing, and that Jack Anderson bought her knowing she had a burned out bearing and put bearings in after that. I further told Mr. Owens that Mr. A. W. Dawe, who was sitting in the back seat of my automobile, who was from New Westminster, B. C., and had two tugs on tap of similar design which he wanted to sell. Mr. Owens and Mr. Dawe talked for a few minutes, and then Mr. Owens said he was staying at the New Washington Hotel and, if Mr. Dawe was going to stay in town that night, he would make reservations for him at the New Washington Hotel so [214] he could stay at the same hotel. They both decided then to do that and meet later, and what they said from there, I don't know. But I told Mr. Owens that the only possible way of telling whether this crankshaft was bent was to put it in a lathe and, that to spend twenty-five thousand dollars for this tug, when he could buy another tug of similar design for thirty-five thousand dollars without a bum crankshaft, was throwing money away.

Q. Now, did you ever have a conversation with him after that?

A. The second time that I saw Mr. Owens prior to my coming to Anchorage on Tuesday or Wednesday, the second time I saw Mr. Owens was at 740 Westlake North, the Stikine Machine Works Dock in Seattle. At that time Mr. Owens had purchased the TP 100 from Mr. Anderson. I asked him at the

(Testimony of Gerald Mason Oaksmith.)

time why, after my telling him of the possible damaged crankshaft, had he bought this vessel. Mr. Owens stated that the terms that Jack Anderson gave him on the tug were the deciding factor in his purchase of that tug and that he didn't have the necessary financing to spend thirty-five or forty thousand dollars on another tug and have to pay cash for it.

Q. What was happening on the TP 100 when you saw it at that dock?

A. At that time there was very little activity.

Q. Do you know the date you talked to him there? [215] A. No, sir, I don't.

Q. And you had considerable experience in the sale and purchasing of vessels? A. Yes, sir.

Q. Over a period of several years?

A. Over a period of the last six years.

Q. What is the customary way of having a vessel inspected if you are going to buy it or sell it?

A. The customary procedure in purchasing a vessel is to have——

Mr. Boochever: Now, I object to the customary procedure. It is irrelevant, incompetent and immaterial.

The Court: Do you claim anything for it?

Mr. Renfrew: I maintain, your Honor, that a man who has been in the business for twenty, thirty or forty years, such as the plaintiff in this action, should have followed the customary procedure if it is customary to have a surveyor survey the boat.

(Testimony of Gerald Mason Oaksmith.)

The Court: Nothing of this kind would be admissible unless it was the general custom.

Mr. Renfrew: That is what I asked him, the general custom, the customary procedure.

The Court: That wouldn't ask for a general custom first. You would have to show that there was a general custom in the industry.

Mr. Renfrew: Well, I will revamp the question, your [216] Honor.

Q. Is there a general custom in the industry for the purchase of boats to have all vessels of the size of the TP 100 surveyed before a purchaser buys it?

Mr. Boochever: Now, I object to that, even assuming there is a general practice, your Honor. He is trying to say that Mr. Owens was negligent in the matter of purchasing it. That is what it amounts to. It is totally irrelevant. He had a right to rely on representations made to him and he didn't have to buy according to a general custom and have that certain customary made inspection done. That has nothing to do with this case.

The Court: Objection sustained.

Q. Did you have any occasion to see the crankshaft removed from the TP 100?

A. I don't believe I saw them take it out of the boat; no, sir. I saw them trying to get it out of the boat, but I didn't see them take it out.

Q. Well, from your experience with these TP 100s, is there a proper and an improper way of taking out a crankshaft?

A. I don't believe there is any advertised proper

(Testimony of Gerald Mason Oaksmith.)

way of taking the crankshaft out, unless the owner of the vessel knows the way the vessels were designed and how they were designed to be taken out.

Q. Well, what way are they designed to be taken out? That is [217] what I want to know, is, was there a way to take them out?

A. When the Army Engineers designed the vessels, the vessels were designed so that the stack and the muffler and the upper section of the manifold could be removed and lifted up and out of the vessel, and then, by lifting the pistons or cylinders to the side in the engine room and your base, you could lift the crankshaft up and tilt it and get it out through the top with a crane without any damage to any wood construction of the hull at all.

Q. And that wouldn't have required any ship's carpenters, in other words? A. No, sir.

Q. Well, was that the way this one was taken out when you saw them trying to get it out?

A. No, sir.

Q. Have you been around the shipyards there in Seattle somewhat?

A. Six and a half years around there.

Q. What is the general custom, rule and regulation with regard to men on the boat doing any work on the repairs of the vessel when it is taken into a shipyard?

A. Just the union help in the shipyard touches the vessel on the outside below the waterline.

Q. Is that a definite and set regulation?

A. Yes, sir. [218]

(Testimony of Gerald Mason Oaksmith.)

Q. What about the inside work on the engine?

A. No, sir. The crew can do that.

Q. Is it customary—are you acquainted with the Fairbanks-Morse people? A. Yes, sir.

Q. Is it customary, when the Fairbanks-Morse people undertake a job to take out the crankshaft and do work on an engine, that the crew assist them? A. Yes, it is customary.

Q. In your experience with these TP 100s, how many men could work on an engine at one time taking it out of a vessel?

A. Probably five or six men could work on it.

Q. All the time, you feel?

A. Oh, they couldn't be busy all the time, but there could be that many men working on it in getting the crankshaft out and getting the heads off and the pistons out and things.

Q. How long would it take?

A. I can't answer that.

Q. You don't know. Have you any idea, or would you just be guessing?

Mr. Boochever: I object to that.

A. I would be guessing.

The Court: Objection sustained.

(Whereupon Court recessed for ten minutes, reconvening [219] as per recess, with all parties present as heretofore; the witness Gerald Mason Oaksmith resumed the witness stand, and the direct examination by Mr. Renfrew was continued as follows:)

(Testimony of Gerald Mason Oaksmith.)

Q. Mr. Oaksmith, by taking the crankshaft out of one of those TP boats, other than the way it was designed to be taken out, is there any possibility of bending it in that operation?

Mr. Boochever: I object. He hasn't shown that he is any engineer or expert qualified on that.

Mr. Renfrew: On the other hand I think he has shown that he knew all about them ever since they started to build them and was in charge of the assembly of boats.

The Court: Well, but it is pure speculation, unless there was something in the evidence to show that in removing the crankshaft they exerted such a pressure on one end of it or dropped it or something from which the inference could be drawn possibly that a defect of that kind could have resulted. There isn't anything like that in the evidence. It just calls for pure speculation.

Mr. Renfrew: Well, your Honor, I will admit that there isn't anything in the evidence to show it. I didn't know you had to drop it. I thought the very construction of the boat would require taking it out some way that it wasn't intended to be taken out that it could be bent in that operation. [220]

The Court: Well, but my point is that, unless there is something in the testimony to show that something occurred on which it could reasonably be inferred that the shaft might have been bent that way, why this evidence is just pure speculation.

Mr. Renfrew: I take it that the objection was sustained?

(Testimony of Gerald Mason Oaksmith.)

The Court: Yes. Particularly in view of the fact that there is testimony here—not only is there an absence of that kind of testimony but there is positive testimony of statements made to the effect that it was due to warping from heat. If we were in a position where we had to try to account for the shaft being bent, why then we might speculate on it, but otherwise——

Mr. Renfrew: I didn't recall any such testimony, of warping from heat, your Honor.

The Court: There is that testimony.

Mr. Renfrew: Does your Honor recall who so testified?

The Court: I don't recall the witness' name, but it was testified to, I think, in connection with the testimony of two witnesses.

Mr. Renfrew: I would like to have a transcript of any of that testimony that the reporter can find, and I will be glad to pay for the reporter finding that. [221]

The Court: Well, I am sure I haven't got a hallucination. I think it is there.

Mr. Renfrew: I rather imagine that I am getting senile, but still that is the reason I want to check on myself.

Q. Mr. Oaksmith, have you been in the marine supply business, did you say? A. Yes, sir.

Q. For how many years, did you say?

A. About six years.

Q. And are you familiar with lifeboats?

(Testimony of Gerald Mason Oaksmith.)

A. Some.

Q. Do you know the lifeboat that Jack Anderson had off the TP 100? A. Yes, I do.

Q. Did you see it? A. Yes, sir.

Q. Where did you see it?

A. At Olson and Wing Shipyard in Seattle.

Q. And when? A. 1949.

Q. And will you state the circumstances under which you saw it there?

A. I had a boat called the Stormbird moored at Olson and Wing Shipyard. It was called Northwest Ship Repair at that time, manager, Al Copp. In looking and searching for [222] a lifeboat for my boat the Stormbird which I had chartered to Alaska, I saw this lifeboat sitting over underneath the shed. I asked Mr. Copp who owned the lifeboat. Mr. Copp said he didn't know who the owner was, but he said Olson and Wing told him that, that the Lois Anderson brought the lifeboat in and left it there. I then asked Mr. Copp, if I insured the boat, would it be all right to borrow it, and he said he was sure I was reliable enough, that I could borrow it for two months, so I used that lifeboat, which was the one that he said Jack Anderson brought in there, for two months and returned it in September, 1949.

Q. Am I to understand from your testimony that the shipyard, Olson and Wing, had changed hands? A. Yes, sir.

Q. Had changed hands——

A. Olson and Wing leased the plant out to Northwest Ship Repair.

(Testimony of Gerald Mason Oaksmith.)

Q. Well, now, from your experience in marine supply and having examined this lifeboat, what would you say its value was?

Mr. Boochever: Well, I object to that until he shows that he is qualified.

Mr. Renfrew: He has been in the marine supply business for six and a half years,

Mr. Boochever: Well, marine supply doesn't mean [223] anything about purchasing lifeboats.

The Court: Well, you might ask him whether he knows the value of lifeboats or boats of that type.

Mr. Renfrew: All right, your Honor.

Q. Do you know the value of lifeboats or boats of that type? A. Yes, sir.

Q. All right. In your experience, then, what would be the fair market value of that lifeboat?

A. Three to four hundred dollars.

Mr. Renfrew: That is all. Your witness.

Cross-Examination

By Mr. Boochever:

Q. Is that in the condition it was in when you found it in 1949?

A. No, sir. That is the approximate value in Seattle of surplus lifeboats of that type.

Q. You say surplus lifeboats? A. Yes, sir.

Q. What would they cost new?

Mr. Renfrew: I object to it as immaterial.

The Court: Objection overruled. He has a right

(Testimony of Gerald Mason Oaksmith.)

to test the accuracy or correctness of his testimony by that.

Mr. Renfrew: Well, if it is for that purpose, yes.

The Court: I assume it is. [224]

Q. What would that cost new, Mr. Oaksmith?

A. I would be just guessing, but I would guess that the boats would cost approximately a thousand dollars new.

Q. And was this one in good condition?

A. In good condition; yes, sir.

Q. There weren't many surplus ones available at that time, were there? A. Yes, there were.

Q. Why didn't you buy one?

A. Well, the truth is I didn't want to spend three hundred dollars when I could borrow one for two months for nothing.

Q. You say you are familiar with this particular TP 100, and I believe you stated what that cost when new; is that right?

A. Approximately; yes, sir.

Q. Do you know that what Mr. Anderson paid, did he pay approximately ten thousand dollars for that boat?

Mr. Renfrew: I object on the ground that it is immaterial what Mr. Anderson paid for it.

Mr. Boochever: That is as material as his asking about the question of when it was new.

The Court: Yes. Objection overruled.

A. I don't know what Mr. Anderson paid for it.

Q. Who built the first TP 100?

(Testimony of Gerald Mason Oaksmith.)

A. The first TP boat, not TP 100, the first TP boat was built [225] by the Pacific Boatbuilding Company in Tacoma, the TP 228.

Q. Do you know who built this one?

A. This one was built in Stockton, California, by, I believe it was somebody in Coleberg, if I remember rightly. Coleberg was one of the partners in the company.

Q. Now, Mr. Oaksmith, you knew that this vessel was in poor condition when you saw Mr. Owens down there; is that right?

A. I had not examined the boat personally but I knew from the grapevine that the boat was in poor condition.

Q. And the crankshaft was bad?

A. I knew that the connecting rod was out when the boat was sold in Seward.

Q. Well, in other words——

Mr. Renfrew: Just a minute. I want a full answer to that question.

Mr. Boochever: Would the stenographer read the answer please?

The Court Reporter: A. "I knew that the connecting rod was out when the boat was sold in Seward."

A. When the boat was sold.

Mr. Renfrew: What?

The Court: When the boat was sold at Seward.

Q. Now, in other words, the only thing that you knew was wrong with the engine was that one connecting rod wasn't fastened; is that right? [226]

(Testimony of Gerald Mason Oaksmith.)

A. I knew that the boat, the crank in particular —it is called the crank journal—was rough. I knew that they were not able to hold bearings on that journal.

Q. In other words, they couldn't hold bearings on it?

A. Well, I knew that the crankshaft was possibly scored and possibly warped. The warping was the reason that I figured that the bearings would not hold on that journal.

Q. And you knew that at that time?

A. From the grapevine; yes.

Q. Now, are you still in the marine supply business? A. No, sir.

Q. When did you cease to be in that business?

A. About two weeks ago.

Q. And while you were in that business did you have a good deal to do with Mr. Anderson?

A. Very little.

Q. Very little. Are you a close friend of his?

A. No, sir.

Q. How did you happen to discuss this case with him?

A. After I told Mr. Owens of what the reported condition of the crankshaft was, I met Mr. Anderson out at Olson and Wing, or one of the shipyards, and I told Mr. Anderson what I had told Mr. Owens, and Mr. Anderson said, "Well, at least you are not two-faced about it. You don't go behind my back and talk about it," and I said, "No. I am [227] telling you what I told Mr. Owens. I tried

(Testimony of Gerald Mason Oaksmith.)

to get him to buy a tug from my friend in New Westminster," and he said, "Well, when you are that honest, I can't hold it against you," and that is all that was said about it.

Q. Now, Mr. Oaksmith, you said you are familiar with the Fairbanks-Morse outfit, are you?

A. I am familiar with the company; yes, sir.

Q. Do you know Ted Engstrom?

A. I know of Ted Engstrom; yes, sir.

Q. Is that a good company?

A. It is one of the best.

Q. It is a competent boat engineering company?

A. That is right.

Q. I want to get one point clarified. Did you say that you knew they had trouble with the crankshaft at Seward? Is that what you understood?

A. I knew that when the boat was declared surplus in Seward and tied up that she had the crankpin out and that she had had a burned out bearing and that something was wrong with the crankshaft.

Mr. Boochever: That is all.

Redirect Examination

By Mr. Renfrew:

Q. That was before Captain Anderson purchased the boat? [228]

A. Yes, sir. That was in 1946.

Q. Do you know how long the boat was laying in Seward before he bought it? A. No, sir.

Mr. Renfrew: That is all. Thank you.

JACK CONRAD ANDERSON, SR.

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Will you state your full name?

A. Jack Conrad Anderson.

Q. Where is your residence, Mr. Anderson?

A. Well, it is in wintertime in Seattle, and in summertime it is up here. We have a home in Seldovia.

Q. And how long have you beeen engaged in navigation here on Cook Inlet?

A. About thirty years.

Q. And are you—do you hold any licenses?

A. Yes, sir; master's and also chief engineer's.

Q. Are you a machinist?

A. Well, I wouldn't say I was a first class machinist, but fair.

Q. You were the owner of the TP 100 with your son, were you not? [229]

A. That is right. He purchased the boat and, in other words, the boat was bought in his name.

Q. And you used it in the operation of your transportation business on Cook Inlet in the summer of 1947, did you, or 1946?

A. 1946; yes, sir.

Q. Now, did you have any trouble with the vessel in the summer, when you operated it here on the Inlet, to speak of?

A. We did have a little trouble with the number

(Testimony of Jack Conrad Anderson, Sr.)

three crank bearing. The journal seemed to run warm when we pushed the boat, but other than that the boat done a lot of work.

Q. And from the time that you bought the boat —well, what time of the year was it that you took delivery in Seward?

A. It was in the spring of 1946.

Q. And then as soon as navigation opened here, did you put it to work right away?

A. That is right.

Q. Am I to understand that a bearing was out of it when you bought it? A. Yes.

Q. And did you have that repaired yourself?

A. We repaired that ourselves; yes.

Q. And then you started right away to operate the boat, did you? A. That is right. [230]

Q. And that would be in the spring of 1946?

A. 1946; yes.

Q. And did you operate it during the spring and the summer of 1946 here in the Inlet?

A. That is right.

Q. And then when did you take it south?

A. About the 10th of February in 1947.

Q. And now, up and until that time had it operated without any additional trouble on the bearings?

A. That is right, with the exception that we babied that one cylinder. That one cylinder was giving us a little trouble.

Q. And is that the same cylinder that you hung up as has been testified to here?

A. That is right.

(Testimony of Jack Conrad Anderson, Sr.)

Q. Now, on the trip to Seattle did you have any difficulty? A. None whatever, except——

The Court: Was that an additional cylinder, that was put out of commission, to the one that the previous witness testified was already out at Seward when you bought the vessel?

A. When we bought the vessel at Seward, sir, we repaired this one bearing. We repaired it. We repaired the bearing.

The Court: You were running on all cylinders after that?

A. That is right; but, as I say, we had to watch it very [231] closely.

Q. Well, was it the same one that you repaired that went bad?

A. That is right; number three. In other words, number three crankshaft journal was rough. We tried to polish it up. Due to the fact there were no facilities to do that kind of work, we waited until we got to Seattle.

The Court: The journal is the box with the bearing in it? A. That is right.

Q. Now, on the way to Seattle you drove it down under five cylinders? A. That is right.

Q. And was your son taking a power barge out at that time? A. That is right.

Q. And there has been some testimony here concerning towing. Did you at any time tow the power barge?

A. Several times when he got behind too far. In other words, we made better speed than him, and

(Testimony of Jack Conrad Anderson, Sr.)

he got back a little ways. We threw a line on him, or otherwise ran circles around him and kind of waited for him that way.

Q. And did you have occasion to use the winch on the back end doing that?

A. Yes, sir; we used the towing winch.

Q. Now, on your trip south did the vessel strike a rock or log or some object? [232]

A. Now, whenever I make a statement like that, if anybody knows a master mariner——

Q. Just answer the question.

A. Yes. We say we struck a submerged object. Now, that can be rock, logs, or anything else, ice or anything else.

Q. Did you make the entry in the logbook?

A. Yes. Striking a rock, I believe.

Q. Will you explain to the Court just how the vessel acted? What happened? Did you go up on something and have to back off, or what?

A. No. We just hit, and I stopped immediately; on hitting I stopped and backed off; yes.

Q. And was the vessel hung up on some object?

A. No, sir.

Q. When you say you backed off, then what do you mean?

A. Well, it stopped, see, and I naturally wouldn't go on because the vessel stopped. We were running at slow bell at the time we struck, and the vessel stopped, and after she laid there a while I backed up.

(Testimony of Jack Conrad Anderson, Sr.)

Q. You mean that you stopped the vessel, or the vessel stopped? A. The vessel stopped.

Q. And then what did you do? Ring the engine room?

A. I rang the engine room immediately and backed up.

Q. And what happened after that? Did you make any inspection? [233]

A. Yes. The first thing I spoke down to the engine room and asked what the condition was down there, and Mr. Saindon at that time was acting chief, and he told me that everything was under control, so then I started running around the boat, and we got a flashlight and things, and I looked over the bow and I seen that there were some slivers on the bow but, due to the fact that there was no leak, why we proceeded on to Funter Bay and anchored for the night.

Q. Did you make any further inspection there as to whether or not there was any damage?

A. Yes. We looked down in the hold in the fore-peak or in the chain locker. You can take a deck plate off on top of the deck right by the anchor winch, and you can look right down in through there, and we seen water down in there, but then there is always water in there on account of this deck plate on deck. We were right in the Gulf and we were in some pretty heavy weather there, and it is normal with the sea coming over. It seeps down through the chain pipe. That is the pipe where the chain goes down into this locker, and also,

(Testimony of Jack Conrad Anderson, Sr.)

this cover on the deck, it wasn't tight. You couldn't really tighten it.

Q. Did you stop at Ketchikan?

A. Yes, sir.

Q. Did you make any further examination there to see whether there was any serious damage. [234]

A. No, not that; only you could look on the bow there and you could see a few slivers hanging out there, but we figured, well, as soon as we get to Seattle, why she is going on drydock anyway, so——

Q. All right. Then did you proceed on to Seattle? A. Yes, sir.

Q. Did you have to pump the vessel any going down?

A. No, sir. Pardon me; I recall. I believe that I asked once down there, "Is there any water in the boat at all down there, Harry?" And I talked down through the speaking tube, and he said——

Mr. Boochever: I object to what he said as hearsay.

The Court: Yes. It is not in response to any question.

Q. Well, I am not interested in what he said to you back up through the speaking tube, but just tell what was done.

A. I asked him if there was any water in the vessel, more than usual, and he said "No."

Mr. Boochever: I object.

Q. You can't tell what he said. Counsel objects. Merely state what you did. Did you examine it to see if there was any water?

(Testimony of Jack Conrad Anderson, Sr.)

A. Well, we pumped her out, I believe, dry there, or anyway that took place. The conversation was that——

Q. You can't tell the conversation, Jack. Tell what you did. [235]

A. In other words, I told Harry Saindon to see that she was pumped dry—through the speaking tube.

Q. All right. Was it pumped dry?

Mr. Boochever: I object to that unless he personally inspected it and knows that of his own knowledge.

Mr. Renfrew: Well, I assume that he——

Mr. Boochever: So far it has all been through the speaking tube, and I don't know what he did himself.

The Court: I don't think you can assume that in view of——

A. Pardon me, your Honor. As a master mariner, if you speak through a tube down in the engine room, you reply. If you have no more control over the crew than that, why God help us sailors; that is all I can say.

The Court: Well, except that you are not permitted over objection to say what somebody else said.

A. I see.

The Court: If they ask you what you said, why you can say that, but if you are asked about something or some condition, why, if you don't know of it, you can't tell what somebody else told you.

(Testimony of Jack Conrad Anderson, Sr.)

A. Yes; but, your Honor, if you are giving a direct order, why, you——

Q. Well, never mind, Jack. It doesn't make any difference. Was the vessel pumped dry? Do you know that? [236] A. Yes.

Q. And then did it take any more water between there and Seattle?

A. To the best of my knowledge, it was not pumped any more as long as we had the vessel.

Q. And now, when you got to Seattle, what did you do?

A. When I got to Seattle, we moored the vessel over at Olson and Wing's Shipyard.

Q. And was it ever put in drydock there?

A. No, sir.

Q. Where did she lay? Right alongside of the dock in the water?

A. It laid right alongside of the Lois Anderson power barge.

Q. And how long did she lay there?

A. Oh, I would say probably two or three weeks. I wouldn't offhand——

Q. Now, during that period of time did you decide to sell the vessel? A. Yes.

Q. And I will ask you, also during that period of time did you make any inquiries as to getting it repaired?

A. Yes. I had several inquiries in regard to repair. At Olson and Wing there was several times I went over and I wanted bids on it.

Q. Well, now, with regard to the engine, had

(Testimony of Jack Conrad Anderson, Sr.)

you had any [237] connection with the Fairbanks-Morse people previous to this time or with any other engine works there about checking on the engine or doing any work on the engine?

A. We had some correspondence with the Fairbanks-Morse people while we were running on the Inlet.

Q. You mean in the summertime?

A. In the summertime, yes. And I wrote back to them and inquired in regards to a new crankshaft if it happened to be needed, or anything like that, or what could be done to a crankshaft, because it had me kind of puzzled. As a matter of fact, due to the fact, I mean due to the fact that we couldn't get it repaired up here and didn't know what method they would use to repair the shaft, so I inquired about that, and he said there were several ways.

Mr. Boochever: I object to what he said as hearsay.

The Court: Yes. You can't say what somebody else said.

Mr. Renfrew: Your Honor, the Court allowed in this morning all the testimony about what the Fairbanks-Morse people said and about what they talked about when they were fixing the vessel. Now, I can show that this man received information as to what it would cost to repair that vessel.

The Court: Well, the testimony to which you call attention that was received, if it was hearsay, was received because you failed to object to it. [238]

(Testimony of Jack Conrad Anderson, Sr.)

Mr. Renfrew: Well, I will admit that I failed to object to it, and I only failed to object to it because I felt that in a trial before the Court and your allowing in all of this testimony in regard to the repairs, what so and so told him about how they had to fix this and had to fix that——

The Court: You say you wrote them a letter?

A. Yes, sir.

The Court: Inquiring what it would cost to repair?

A. Yes, sir; what method they used and what it would cost for a new shaft, or what other ways they would fix this shaft if it could be fixed.

The Court: Well, objection will be overruled.

Mr. Boochever: Well, your Honor, may I be heard on that, then? I think, if they wanted to have any testimony to that effect, they could certainly have gotten the deposition of the Fairbanks-Morse man, and we could have cross-examined him on it. This way, why we have this witness telling what someone else told him. It is pure hearsay, and we object to it.

The Court: Well, except that there has been hearsay to a considerable extent in the case.

Mr. Boochever: I don't believe that has any bearing on this whatever.

Mr. Renfrew: Well, if counsel wishes to object, your Honor, I will ask the Court for time to take the [239] deposition, or we can put this case off until next year and take care of it next year when you come back.

(Testimony of Jack Conrad Anderson, Sr.)

The Court: Well, very well, then.

Mr. Boochever: Your Honor, I certainly don't agree to putting it off to next year. I assume these depositions will be taken immediately after the trial.

The Court: No; I think that is just a mere hyperbole; that is all.

Q. Well, Mr. Anderson, then after you got down there to Seattle, did you make any effort to determine what it would cost to repair this vessel?

A. Yes, sir.

Q. And on the strength of what you were able to determine, what did you conclude it would cost to repair the vessel?

A. Approximately sixteen hundred dollars—that is for the crankshaft, you are speaking about now?

Q. That is for the crankshaft? A. Yes.

Q. And what did you estimate that the carpenter work could be done on the forefoot for?

A. They would fix the forefoot, oh, they said in the neighborhood—this is Olson and Wing——

Mr. Boochever: I object to this.

Q. Mr. Anderson, counsel has now, relying upon the technical rules of evidence which prohibit you from making any [240] statement that anyone told you unless it was in the presence of Mr. Owen here, so I asked you not what—what they told you, but what you concluded it would cost you to repair this vessel, put it back in good shape. How much money

(Testimony of Jack Conrad Anderson, Sr.)
did you figure it would cost you to put this back in good shape?

A. About five thousand dollars.

Q. All right. Now, where did you meet Mr. Owens?

A. I met Mr. Owens coming aboard the vessel at Olson and Wing Shipyard.

Q. Was that the first time that you ever saw him in your life? A. That is right.

Q. Well, now, will you explain what was said between you and Mr. Owens and who was present, and tell us the conversation? Now, this time you can tell the conversation, anything that was said in Mr. Owens' presence.

A. Mr. Owens came aboard the vessel and asked me if I was the owner of the vessel. I said, "My son is the owner, but I am one of the representatives. We are working together," and he asked me, "Is the vessel for sale?" And I said, "Yes. We are planning on selling it," and so he asked me, "What are you asking for the vessel?" I said, "Twenty-five thousand dollars."

Q. All right.

A. So he said, "Oh," and so he says, "Do you mind if I look [241] around?" and I said, "No, not at all." So he started walking around the boat, and I followed him, and looked up forward and through the galley and through the fiddley and down in the engine room, and so he said, "What shape is the boat in?" I said, "In fair shape with the exception it has got a damaged forefoot and

(Testimony of Jack Conrad Anderson, Sr.)

a burnt''—I am trying to think of the name—''journal or crankshaft journal. We had a little difficulty with that and we are anticipating fixing it. We don't know yet what method we are going to have to use in getting it fixed,'' and he walked through the engine room, and I showed him, ''There is the one, that piston that you see there; that is the journal that is damaged,'' and I said, ''scored, and there is the piston that is hanging in the clamp with a piece of wire around it. We pulled the piston up to the top center and clamped it off with a cable and a clamp,'' and we walked aft into the lazaret, a gear locker, and looked over various things there. That is about all that was said at that time. He went. He did mention before he left he might be back, or something to that effect; I don't just recall what.

Q. Now, did you have other people looking at the vessel?

A. Yes, sir. A party came down from Vancouver by the name of Pacific Coyle—tow boat or something. I don't just recall what their last name was. He came aboard and he said——

Mr. Boochever: Your Honor, I object to what he said [242] as hearsay.

Q. Don't say what he said.

Mr. Renfrew: I will stop him.

Mr. Boochever: Further than that, I object to anything further, other than that they had someone else looking at it. I don't see the relevancy of any other prospective purchasers.

(Testimony of Jack Conrad Anderson, Sr.)

The Court: Yes.

Mr. Renfrew: Did your Honor rule? I am sorry.

The Court: I ruled against admitting evidence of that kind.

Mr. Renfrew: May I be heard for just a second, your Honor? I intend to connect this up to show that these other men were there working on the boat, miking the engine, when Mr. Owens came down and saw them doing it, and saw them working on it.

The Court: It may go in, then.

Mr. Renfrew: Thank you.

Q. Now, as a result of this man of the Pacific Coyle Company—did he send a surveyor there?

A. He had a surveyor with him, a competent surveyor with him there.

Q. Did that surveyor then examine the boat and go into the engine room?

A. He was in the engine room. [243]

Mr. Boochever: Your Honor, excuse me; I don't want to keep interrupting, but, unless it is shown that Mr. Owens was present when all this was going on, why, I think it is immaterial.

Mr. Renfrew: I am getting there.

The Court: Well, in view of the promise of counsel that he is going to show that, why, the objection will be overruled.

Mr. Renfrew: It is certainly what I have been told, your Honor, or I wouldn't bring it up.

(Testimony of Jack Conrad Anderson, Sr.)

Q. And now, while the surveyor was there going over the boat, did Mr. Owens come back?

A. Mr. Owens came back down there, and he seen that there was somebody down below there, and I told Mr. Owens that "I have a man from Vancouver here with an engineer, and they are miking the shaft, and I am going down there. We are trying to find a mark on the crankshaft to see whether it had been passed by the American Bureau or not." That seemed to be the main thing that he was interested in, and we found the marking, and as far as any questions of Mr. Owens—oh, yes, and Mr. Owens then told me that he had been informed that the crankshaft is twisted or bent, so I asked him, I said, "Who told you this?" Well, he didn't answer that, so, well, he said, "What is the best you will do on the boat?" I said, "The best I will do on the boat [244] is I will take twenty-five thousand dollars as is, or thirty thousand dollars and fix it up in running order."

Q. Was there any further conversation at that time?

A. No. The only thing is that he said, "That is the best you will do?" and so—yes—we got talking about terms, what kind of terms. Mr. Owens wanted to know what kind of terms he could get. Well, I said, "Naturally, we all like to get all the money we can, because I need it because I have a lot of work to do on another boat," so, well, he couldn't raise the ten thousand dollars, or whatever it was, something he said about he couldn't raise

(Testimony of Jack Conrad Anderson, Sr.)

the ten thousand dollars, but—and then he came back and he said how could he make monthly payments. I said, "Well, I would have to inquire through the bank, but I could get just about what you want through the bank because I have a pretty good reputation with the bank."

Mr. Boochever: I object to that as self-serving evidence.

Q. Just tell what you said. Did you tell him that you had a mortgage on the boat or something?

A. Yes. I owed a mortgage to the bank. I said, "How would two thousand dollars—if you take the boat as is, how is two thousand dollars—five thousand dollars down and two thousand dollars a month," and he said, "That sounds all right." [245]

Q. Well, what happened then?

A. Well, I guess he left then.

Q. Did you make a deal then?

A. No, not then.

Q. All right. Well, now, did he ever come back again to the boat?

A. Well, I can't say anything about these other people leaving, can I?

The Court: Well, you can say anything in response to a question except what somebody else said unless it is one of the parties, and you are one of the parties and Mr. Owens is a party.

A. I see. Well, the people that was working on the engine, they got through with it, and they went over it from stem to stern, and they said they would give me a call within a few days—I believe

(Testimony of Jack Conrad Anderson, Sr.)

this was on a Monday—in two or three days, so I waited around, and there was no answer come, and we were getting kind of jittery, so I was going to call Vancouver and find out what the status was. Meantime Mr. Owens came down—I believe it was on a Saturday—came down again and asked me if that is the best I would do on the boat, and I said, "Yes," and while we were talking a phone call came through on the loudspeaker that they wanted me at the phone.

Q. Wait a minute. Is there a loudspeaker on the dock? [246]

A. On the dock, yes. In other words, the operator at the phone, she talks through a mike, or whatever it is, and you hear it out in the yard. I went and answered the phone, and it was Pacific Coyle and Company, or Mr. Coyle, and was talking on the phone, and he asked me if that is the best I would do on the vessel. I said, "That is the best I will do, is the offer that I gave you the other day." So, Mr. Owens was standing right there by me, so, I put my hand over the mike. I said, "This is the party in Vancouver. They are interested in the boat." Several questions took place there, and I couldn't just exactly tell the words, but they were interested in buying the boat as is, where is, so I asked Mr. Owens, "What shall I tell them?" "Tell them that you have sold the boat." So I got back on the phone and told them, "Very sorry, I have sold the boat. I have made arrangements here and I have sold the boat," be-

(Testimony of Jack Conrad Anderson, Sr.)

cause Mr. Owens told me, he said, "As soon as we get up town, no later than Monday, I will give you a check for five thousand dollars in escrow on the boat and two thousand dollars a month." So from there on, why, we went up to the office and——

Q. Now, before you went up to the office, let's go back to this discussion that you had with Mr. Owens about the ten thousand dollars down that you mentioned a while ago. Now, what was the conditions of the payment of the sale [247] if it was to be ten thousand dollars down?

A. The condition of the sale for ten thousand dollars down, I would fix the boat in running order.

Q. Well, what was the sale price to be then?

A. Thirty thousand dollars. In other words, on the ten thousand dollars down, I wanted five thousand down and—excuse me; I will repeat that. When I—if he bought the boat, I wanted him to pay twenty-five thousand dollars for the boat. That is what I wanted for the boat, see—take it as is where is. If he paid thirty thousand dollars for the boat, ten thousand dollars down, I would fix the boat in a running condition. So, he said over there at the phone he would take the boat as is for twenty-five thousand dollars, five thousand dollars down, and he would give me a note or a check as soon as we got up to the office and he seen, I believe he said, Mr. Morgan.

Q. And then did that conclude your conversation there that day? A. That is all.

Q. And when did you next see Mr. Owens?

(Testimony of Jack Conrad Anderson, Sr.)

A. It didn't conclude. I took Mr. Owens to town, and we discussed the various things on the way in, in regards to if he had to take the tail shaft out and hoping that he wouldn't have to do that, because, I thought, if he could get a competent man down there and turn that journal, it could be fixed or [248] otherwise they have got a method of metal spraying the shaft, so I said, "There is a way of taking the shaft out."

Mr. Boochever: Excuse me. Is this a conversation with Mr. Owens?

Mr. Renfrew: Yes.

A. Yes; driving to town.

Mr. Boochever: All right. I just wanted to get that straight.

A. There is a way of taking the shaft, the shaft has to be pulled out through the stack, remove the stack and about two lengths of manifold pipe, I believe it is, and then lift the cylinders and take the crankshaft up through the fiddley in the stack.

Q. Now, did Mr. Owens say anything to you about the crankshaft?

A. Yes, sir. He told me at that time that if such a thing would happen that he believed he could get a surplus crankshaft in Juneau.

Q. And what did you do then?

A. I left him off in town, I believe at the Washington Hotel, or some place in town.

Q. And when did you see him again?

A. We seen him Monday, I believe the following Monday, and we wrote up an agreement then.

(Testimony of Jack Conrad Anderson, Sr.)

Q. This is Plaintiffs' Exhibit 1. I ask you, is that the [249] agreement as near as you can recall?

A. Yes.

Q. Now, on the original agreement there was also a directive to the First National Bank of Anchorage, was there not? A. Yes.

Q. And did you advise Mr. Owens that that is where you had the mortgage on the vessel?

A. Yes.

Q. And what arrangement was he to make for the payment; where was his payments to be made?

A. His payments was supposed to be made to the First National Bank of Anchorage.

Q. And did Mr. Owens do that? He made the payments, didn't he? A. Yes.

Q. And now, when was the first time you had any knowledge—wait a minute, before we get to that. These papers were made up in Mr. Owens' lawyer's office? A. That is right.

Q. You didn't have a lawyer down there?

A. No, sir.

Q. And that is the first time you ever met his attorney? A. That is right.

Q. And the papers were executed there?

A. That is right. [250]

Q. And Mr. Owens' check for five thousand dollars, that was left not in escrow in the bank but it was left with his lawyer, wasn't it?

A. That is right.

Q. And his lawyer kept that even though he had

(Testimony of Jack Conrad Anderson, Sr.)

possession of the boat until you got the bill of sale from the Army? A. That is right.

Q. Now, in the meantime, after you had made your deal up there, what happened to the boat?

A. He asked me if he could take the boat down and start working on it because he had to repair it and he would like to move it down to Brueger's Dock or some place; I don't recall the name, Stikine Fish, or down on the lake; and I said he could take the boat at any time and I would be willing to let him have the boat and fix it.

Q. Did he take the boat then right away?

A. That is right.

Q. Were you aboard when it was taken over there? A. That is right.

Q. Sir? A. Yes.

Q. And was Mr. Owens aboard? A. Yes.

Q. And did it go over under its own power?

A. Yes, sir. [251]

Q. Now, how long did you remain in Seattle, Mr. Anderson, before you came north?

A. We left Seattle on the third of June.

Q. Then you were in Seattle from the time that you made the sale to Mr. Owens in the first of April until the third of June?

A. That is right.

Q. Now, did you hear anything from Mr. Owens or from his attorney during that period of time that you were there in Seattle, any objection of any kind to the deal? A. No, sir.

Q. None at all? A. None at all.

(Testimony of Jack Conrad Anderson, Sr.)

Q. And were you—did you have the power barge, the Lois Anderson, was she tied up there during that period of time?

A. That is right.

Q. Right at the same dock?

A. Same dock.

Q. Now, when you got ready to come north, did you see Mr. Owens about the lifeboat?

A. I spoke to Mr. Owens sometime before that. I believe it was in the hotel or some place. I asked him, "Say, I want to know about the lifeboat you got on there. Are you going to use both the lifeboats you got on board the [252] tug?" And he said, "No; I don't think so." He said, "It is pretty crowded on that deck, and I am going to take that lifeboat off anyway and put a work boat on there," and then I said, "Is it O.K. if I use the lifeboat to go north? I have got a lifeboat in Seldovia, so can I use the lifeboat to go north?" And he said, "Yes." He said, "And then you can throw the lifeboat off on your return back here. Throw the lifeboat off here on your return back to Seattle, and I will pick it up sometime when we come in."

Q. Now, did you take the lifeboat then when you went north?

A. Yes. We went up to the TP 100 and picked up the lifeboat.

Q. Now, you heard Mr. Blanchard testify here this morning? A. Yes.

Q. Was Mr. Blanchard there when you got the lifeboat? A. Yes.

(Testimony of Jack Conrad Anderson, Sr.)

Q. Did you have any conversation with him?

A. Not much. The only conversation I had with him was I said, "I come over here to get a lifeboat that Mr. Owens O.K.'d for me to use." He said, "Yes. I know that."

Q. And that was about the extent of your conversation? A. That is right.

Q. Now, do you remember the day—when that was with relation to when you started north?

A. No; I wouldn't recall that. [253]

Q. You don't know whether that was a day or two before you started north?

A. Shortly before. We was ready to get the lifeboat on, so I think we were getting ready to leave the lake, so it must have been in the latter part of May. I wouldn't say for sure.

Q. Now, you didn't leave Seattle at all until the third day of June; is that right?

A. That is right.

Q. Had you heard anything from anybody, either Mr. Owens or Mr. Mills or Mr. Chadwick, I believe was the other lawyer, either Mr. Chadwick, Mr. Mills or Mr. Owens, about any "diffugulty" or dispute or anything?

A. No, sir; none whatsoever. We never heard anything until we got up here, and I came up to the banker and made a deposit, and he said, "Say, I have got a letter for you in here. Do you know that Mr. Owens is going to sue you?" I said, "For what?" Well, he said, "He is going to sue you."

Q. When was that?

(Testimony of Jack Conrad Anderson, Sr.)

A. Oh, that must have been the latter part of June.

The Court: Well, did Owens know you were in Seattle until June 3rd?

A. He must have.

The Court: How would he know it? [254]

A. I don't know.

The Court: Well, I am asking you.

A. Well, I am sorry, sir. Your Honor, he knew where we were at.

The Court: Where were you?

A. At Olson and Wing Shipyard.

The Court: Why would he know you were there? What makes you think he would know you were there?

A. Well, because several occasions we talked about different work to be done on the boat.

The Court: Well, but how would he know you were going to be there until June 3rd?

A. I don't know.

Q. Didn't you testify, Mr. Anderson, you told him you had a lot of work to do on your other boat? A. That is right.

Q. And your other boat was tied right up there at the time? A. That is right.

Mr. Boochever: I object to it as leading.

Mr. Renfrew: It is leading, but it is refreshing his recollection. He testified to it before.

The Court: Well, I think it is the kind of leading question that is harmless.

Q. Then the first word you heard of it was after

(Testimony of Jack Conrad Anderson, Sr.)

you got north? [255] A. To Anchorage; yes.

Q. Now, I want to call your attention to Plaintiffs' Exhibit, the letter; I think it is June 11th that letter is dated. I want you to examine this. This is Plaintiffs' Exhibit No. 20. That is your signature, isn't it? A. That is right.

Q. Now, what is the date on that letter?

A. June 11th.

Q. And now, did you receive a letter to which that was a reply to?

A. Well, this is—I don't recall if this was the letter that I answered when I got up here, that I got from the bank. Anyway they told me at the bank and they handed me a letter, and I don't remember if this is the one I answered. It must be though because I didn't know anything about it until I got up here.

Q. Well, immediately after you got that information from the bank, or wherever you got it, is that when you immediately wrote Mr. Owens?

A. That is right.

Q. And did you ever get an answer to that letter?

A. I never did get an answer to this letter; no, sir.

Q. Now, did you not at a later date hear from Mr. Owens' attorneys again? A. Yes. [256]

Q. Do you know when you received that letter?

A. No, sir; I don't.

Q. Well, where were you during the summer of—what is the date of that letter? 1948?

(Testimony of Jack Conrad Anderson, Sr.)

A. 1947.

Q. Where were you during that summer?

A. We were running up and down the Inlet here.

Q. Here in Cook Inlet? A. That is right.

Q. And now, did you subsequently return this lifeboat?

A. In the fall when we returned to Seattle I took the boat off at Olson and Wing Shipyard; yes.

Q. Is that where you got it?

A. No. I got it at Brueger's, but he told me to take the boat. I never went up to Brueger's. He told me to set the boat off at the same place we had the tug at that time.

Q. Where did you have the conversation with him asking him if it would be all right to use it?

A. I can't tell if it was on the way going in in the car that day when we made the deal, or if it was out at the yard.

Q. You mean—was it at the time you were making the deal? A. That is right.

Q. It was either at the shipyard where the boat was or on the way into town?

A. On the way into town; yes, sir. [257]

Mr. Renfrew: I think that is all. Your witness.

Cross-Examination

By Mr. Boochever:

Q. When did you purchase the TP 100, Mr. Anderson? A. In the spring of 1946.

(Testimony of Jack Conrad Anderson, Sr.)

Q. And you purchased it for ten thousand dollars?

Mr. Renfrew: Now, I object to this as immaterial. Now, just a minute. I didn't ask him on direct examination anything about the price. Now, what can he ask him, how is that material, as to what he purchased it for?

The Court: Well, he testified he did purchase it, didn't he?

Mr. Renfrew: Yes; he purchased it.

The Court: Well, that certainly would be within the scope of that direct examination then to ask him what price he paid for it.

Mr. Renfrew: Well, how is it material what he paid for it?

The Court: Well, it would seem material in view of the fact that you have introduced evidence that he knew it cost two hundred and fifty thousand.

Mr. Renfrew: But your Honor refused to let me show what it was sold for.

The Court: What it was sold for? [258]

Mr. Renfrew: Yes. I wanted to show that Mr. Owens sold the boat, and you said that was immaterial. Now, it can't be any more material to show what it—I presume that it cost two hundred and fifty thousand dollars when it was new. That was only to show, your Honor, that the overhaul of such a boat couldn't be expected—I mean, that Mr. Owens couldn't be expected to have gotten the boat in first class shape for twenty-five thousand dollars that cost two hundred and fifty thousand dollars

(Testimony of Jack Conrad Anderson, Sr.)
three years before. That is the only purpose for that.

The Court: Well, but of course there is one radical difference between the two prices to which you call attention. One is apparently long after this lawsuit accrued, and anything leading up to the controversy might be relevant, whereas something that occurred after the controversy developed could hardly be, except under exceptional circumstances, relevant to anything.

Mr. Renfrew: Well, what possible relevancy can there be, your Honor, as to what Mr. Anderson paid for this boat? Now, where can that be relevant in this case in any event? I want to be shown where it can be shown that the purchase price of the boat by Anderson could have any bearing upon any issue in this case.

Mr. Boochever: If I might answer that, your Honor. I objected of course to his question regarding what the boat [259] cost when new. But, as I understood counsel's theory, that had some relevancy in regard to the cost of repair and also had some relevancy in regard to what warranties would be relied on. Now, I want to show that these boats were selling for about ten thousand dollars when they were sold as surplus, and I think I am certainly as entitled to show that as he was to the other evidence brought in.

Mr. Renfrew: Now, your Honor, it wouldn't make any difference if somebody gave him the boat. That hasn't got a thing to do with this contract.

The Court: Well, it wouldn't make any differ-

(Testimony of Jack Conrad Anderson, Sr.)

ence if somebody gave him the boat, but I think it would make some difference how much he paid for it in view of the other testimony.

Mr. Renfrew: I want the Court to state for the purpose of the record in what way you will consider the evidence of what he paid for the boat.

The Court: Well, of course in the first place, I am not required to commit myself in what way I will consider any piece of evidence. I may consider it for more purposes than appear apparent at the time it is introduced, so that I am not going to commit myself on anything of that kind. But I think that it throws light on the condition of the boat.

Mr. Renfrew: On the condition of the boat?

The Court: Yes. [260]

Mr. Renfrew: At the time that he purchased it?

The Court: At a subsequent time, in connection with all his other testimony showing what happened between the time that he purchased it—we have got practically everything in now between the time he purchased it and even before, when the boat was laid up in Seward. The only thing we haven't got now is the price he paid for it.

Mr. Renfrew: Yes, I appreciate it in one particular, your Honor, but I have a fear that the Court can't help but be swayed by the fact that, if it was shown that this man bought that boat for less money than he sold it for, why he must have made a profit, and I stand ready to prove to the Court that Mr. Owens made a good deal more profit

(Testimony of Jack Conrad Anderson, Sr.)
on his sale of the boat than Mr. Anderson did, but the Court wouldn't allow me to put it in.

The Court: Well, now, the reason, as I said a moment ago, why I don't think the price at which the plaintiff sold the boat would be material is because it was after the boat was repaired and after this controversy had originated, and this is all leading up to the controversy, and it certainly throws some light on the condition of the boat. What the plaintiff got for it after he had it all repaired, as he testified to, would certainly not be relevant, so objection is overruled.

Mr. Renfrew: Very well, your Honor. [261]

Q. You purchased the boat for ten thousand dollars, didn't you, Mr. Anderson? A. Yes.

Q. Now, Mr. Anderson, you said in the spring there that one bearing was out. Actually there was more than one bearing that was having trouble at that time, wasn't there?

A. We looked over all of the bearings but we just checked them.

Q. And isn't it true that the vessel after you got it had been having trouble with one bearing after another, in other words, as Mr. Oaksmith, your witness, testified a little while ago?

A. Repeat that again, please.

Q. Has it had trouble with a number of different bearings, and from time to time you had trouble with a different bearing? A. No, sir.

Q. You just had trouble with one bearing?

(Testimony of Jack Conrad Anderson, Sr.)

A. One bearing.

Q. Now, you stated that you left on February 10th to go on down below; is that right; about that?

A. Yes; about that.

Q. Now, you had the one cylinder held up; is that right? A. That is right.

Q. That didn't interfere with your running the vessel? [262] A. No.

Q. You could run her at good speed and didn't have to in low, or low speed, all the way down?

A. The only reason we went on the slow bell was because we was standing by the power scow.

Q. Part of the time, you mean, you ran on slow bell, when you were standing by the power scow?

A. No. We went slow speed because we were so much faster than the power scow.

Q. And when you were towing her, did you push her up more?

A. We pushed her up, yes, if it was good weather.

Q. Now, you state that on this one day you went in and hit this something; you didn't say what?

A. Submerged object.

Q. As I understand it, you hit this object and came to a stop; that is what you testified before?

A. That is right.

Q. Have you ever hit a log in your experience as a boatman? A. Yes.

Q. Did you ever come to a stop hitting a log?

A. Yes.

Q. When?

(Testimony of Jack Conrad Anderson, Sr.)

A. Right out here in the Sound.

The Court: Well, first you better find out what kind of a boat and whether the log was crosswise to the bow [263] of the boat or——

Q. What kind of boat was that?

A. The Princess Pat.

Q. The Princess Pat?

A. Yes. That is a boat that we have got that we used on the mail run.

Q. How big a boat is that?

A. Sixty-five foot.

Q. How big a boat is the TP 100?

A. Ninety-five; ninety-six.

Q. Now, with this one with the Princess Pat was there one log there or was it attached to the shore, the log?

A. No. This particular time it was a big saw log; we hit it just as we got out of the locks.

Q. You hit this big saw log just as you got out of the locks?

The Court: Was the log end on?

A. No. We hit it on the side.

The Court: A glancing blow?

A. No. Right straight ahead. Yes; I mean we hit it approximately in the middle, I would say. Anyway we kind of jumped up on it like, but we stopped right there.

Q. Jumped up on the log?

A. Well, hit the log and came to a stop.

Q. Now, did you see any log out there when you

(Testimony of Jack Conrad Anderson, Sr.)

stopped this time on the way down to Seattle? [264]

A. Well, there were a lot of logs all over.

Q. A lot of logs all over. But I mean, right when you hit this something, this object? You were in the bridge, weren't you? A. Yes, sir.

Q. And did you see a log down there?

A. No. You couldn't see anything because it was thick weather. That is the reason we went into Funter Bay there.

Q. As a matter of fact that was a rock that you hit, wasn't it? You know that of your own knowledge?

A. Yes; I would say probably it was a rock. That is what I put down in the logbook, too.

Q. And you put down in the logbook that it was a rock? A. That is right.

Q. And you had good reason to believe there must have been fairly good damage to the front end of your boat as a result of hitting that, didn't you?

A. Well, I wouldn't say. That is just one thing I wouldn't say.

The Court: What speed were you making?

A. When we hit, oh, probably going about—we were running slow on account of the weather.

The Court: Well, you testified to that, but what speed would that be?

A. I would say approximately—I couldn't recall just now, [265] but about four or five knots.

Q. Now, when you sold this boat to Mr. Owens

(Testimony of Jack Conrad Anderson, Sr.)

you told him that the forefoot was bruised, didn't you?

A. I told him like this, "The boat is in a fair condition with the exception of a damaged forefoot and a crankshaft journal, scored crankshaft journal."

Q. Now, I show you a picture of the vessel. I show you Plaintiffs' Exhibit No. 8, and point out the forefoot on that picture, please.

A. Well, I can't even tell if this is a boat or not.

Q. Well, I am not much of a boatman, but it looks like the front end of a boat to me.

A. Can you tell if this is a boat?

Q. I would certainly say it was; yes. It has been testified to that this is the front end of the TP 100.

A. How do you figure? How do you know this is the TP 100?

Q. Well, I am not on the witness stand, Mr. Anderson. I am saying, assuming it is the front end of the TP 100?

A. I would say that the forefoot should be in here some place if it is a boat.

Q. The forefoot isn't there though; is that right? A. I believe this is part of it.

Q. But it has been demolished; is that right?

A. That is right.

Q. Mr. Anderson, who were the members of your crew on the [266] way down there?

(Testimony of Jack Conrad Anderson, Sr.)

A. Gosh, I can't even tell the names now. Mr. Saindon was acting chief.

Q. And who else were in your crew then?

A. I couldn't recall the names now.

Q. You don't remember any of them?

A. No.

Q. Now, you stated that after you hit this rock and pulled off and went on along that you figured on dry-docking in Seattle and determining what the damage was? A. That is right.

Q. But you didn't do that?

A. I didn't do that; no. I didn't want to do it unless we were going to keep the boat ourselves.

Q. Now, you also said at Ketchikan there that you pumped the watertight compartment dry there?

A. Not the watertight, the watertight compartment, I never made a statement like that.

Q. Well, I understood you to that effect. You don't intend to have that as your sworn statement then? A. No.

Q. Now, when you started off down to Seattle did you start off with the intention of selling the boat? Is that why you were going down to Seattle?

A. We were going to Seattle to fix up the boat ourselves. [267]

Q. But after you got down there you changed your mind and decided to sell it; is that right?

A. Well, yes.

Q. Is that because of the way it rode on the way down and because of hitting this rock?

(Testimony of Jack Conrad Anderson, Sr.)

A. No.

Q. Other factors entirely made you change your mind between starting off and getting down to Seattle?

A. When we left Seldovia my intention to go out was to fix the boat up, and either that or getting a smaller boat, trade it in and get a smaller boat. It was too big. It drew too much water for our purpose up here.

Q. Well, now, you have said two things, Mr. Anderson. First you said you intended to go down there to fix the vessel up?

A. To fix the vessel up; yes.

Q. That is what you intended when you left?

A. That is right.

Q. And then when you got down there you changed your mind and decided to sell; is that right?

A. I didn't change my mind. There was several parties came down and asked if I wanted to sell it.

Q. And that is when you decided you might as well sell it?

A. Well, my son and I talked it over, and we figured we would get a smaller boat. [268]

Q. As far as you knew, why you weren't going to sell it just to get rid of it because it was a lemon?

A. No.

Q. And as far as you knew, it was all right except for one crankshaft bearing and for a bruised forefoot; is that right?

A. Damaged forefoot; yes.

(Testimony of Jack Conrad Anderson, Sr.)

Q. And that is what you told Mr. Owens, isn't it? A. That is right.

Q. And that it was in good condition otherwise?

A. I never made that statement.

Q. You said fair condition?

A. Fair condition.

Q. Fair condition? A. "Roger"; right.

Q. Now, you said something about if you would take care of fixing it up into running condition——

A. Running condition; yes, sir.

Q. Well, wasn't it in running condition? You ran down on it, didn't you?

A. Yes. But I wouldn't call it running condition when there is one crank bearing scored and then a damaged forefoot.

Q. Now, in regard to this offer of paying five thousand dollars down and the balance and so forth, I want you to refresh your memory. You said, I believe, that you discussed [269] this ten thousand offer and that you asked him how about five thousand down; is that what you said before?

A. The reason I wanted ten thousand dollars down, if I had to fix the boat I would use the five thousand dollars to fix the boat up with.

Q. Well, I am not interested in your reasoning now, Mr. Anderson. Isn't it true that Mr. Owens came up to you and that he said, "I have got authority from Mr. Morgan to offer you five thousand down and two thousand a month," and that he made the deal at that time?

(Testimony of Jack Conrad Anderson, Sr.)

A. No; he asked me what the best terms he could get.

(Whereupon Court adjourned until 10:00 o'clock a.m., March 10, 1951, reconvening as per adjournment, with all parties present as heretofore; the witness, Jack Conrad Anderson, Sr., resumed the witness stand, and the Cross-Examination by Mr. Boochever was continued as follows:)

Q. Mr. Anderson, yesterday when you were on the stand and your counsel was questioning you, I believe you testified about coming into Ketchikan on your way down to Seattle; is that right?

A. Yes.

Q. And that you testified that you gave orders to your engineer to pump the vessel out; is that right?

A. I got to figure how to explain. I don't know the terms of the Court.

The Court: You can explain it in your own language. [270]

A. O.K. I went to the speaking tube and asked the chief if it looked like there was any water in there.

Q. Did you tell him to pump it out?

A. I said, "If there is any down there, pump it dry."

The Court: Well, are you referring to the time right after striking this rock, or whatever it was, or are you referring to the time at Ketchikan?

(Testimony of Jack Conrad Anderson, Sr.)

A. This is the time at Ketchikan.

Q. After you had struck the submerged object?

A. That is right.

Q. Now, after that you didn't do anything further about that; you left it up to him to follow out your orders; is that right? A. That is right.

Q. So you didn't personally inspect that watertight compartment, did you, at that time in Ketchikan?

A. I don't recall that. I wouldn't recall that.

Q. Now, I believe, getting on now to when you were talking with Mr. Owens, you remember Mr. Dent being with Mr. Owens on one occasion, don't you? A. No, sir.

Q. You don't remember Mr. Dent at all?

A. No, I don't remember him at all.

Q. Do you remember another man being with Mr. Owens?

A. There was a man up on the dock, I remember, came down. [271] There was a man up on the dock, but he didn't come down there talking to me.

Q. You don't remember him at all then?

A. I don't remember. I seen a man. There was a gentleman down there with Mr. Owens, but he was up on the dock.

Q. You don't mean to say that Mr. Dent wasn't with Mr. Owens when you discussed this matter?

A. I wouldn't say he was, or I wouldn't say he wasn't.

Q. That is all right. You just don't recall it now. Mr. Anderson, you state that while you were

(Testimony of Jack Conrad Anderson, Sr.)

on the dock one time while you were talking to Mr. Owens a call came over the loud-speaker for you to go to the phone, and it was this Canadian group calling; is that right? A. That is right.

Q. Where was the phone?

A. Over in the office.

Q. And you went over into the office; is that right?

A. Yes, sir. Mr. Owens went with me.

Q. He went with you? A. Yes.

Q. When you went to make this phone call?

A. That is right.

Q. And then during this you spoke to him and so forth, as you have testified, after hearing the phone call? A. Yes. [272]

Q. And that is the time that the Canadian people phoned you while Mr. Owens was present; is that right? A. Yes.

Q. That was the only time?

A. No. I believe they called me two or three times.

Q. While Owens was present?

A. Well, I wouldn't say, but I know at this particular time he was there.

Q. And that is the only time you recall that he was there when the Canadian people phoned; is that right? A. Yes; as I recall it.

Q. Do you remember whether the Canadian people phoned you while you were in Mr. Mills' office with Mr. Owens?

(Testimony of Jack Conrad Anderson, Sr.)

A. I wouldn't say for sure. I don't remember that.

Q. As a matter of fact, Mr. Anderson, isn't that the time that they phoned you and you were in the office having the agreement drawn up and that you got this call that came into Mr. Mills' office from the Canadian people? A. No, sir.

Q. That is wrong, and you are sure of that?

A. I am sure I got the call at Olson and Wing Dry Dock, and that is when I put my hand over the mouthpiece and said, "This is Pacific Coyle Company up there. They want to know about the tug."

Q. And you are sure you didn't get that call from the Canadian [273] people while you were up in Mr. Mills' office and that you spoke to Mr. Owens at that time about it?

Mr. Renfrew: Well, your Honor, he has answered that question several times. I don't understand the last question myself. He explained how he got the call at the dock.

A. Pardon me; but, if I got a call up to the other office, it was just trying again if there was a chance or something, but I can't recall that.

Q. You don't recall it?

A. No. But I know this particular time I got it at——

Q. Well, now, what I want to know, are you saying that there was no such call in Mr. Mills' office, or are you saying that you can't remember?

Mr. Renfrew: Well, now, your Honor, he has

(Testimony of Jack Conrad Anderson, Sr.)

stated that he can't remember and, if he did get such a call up there, it was because they were trying to make one last effort to buy the boat, but he can't recall definitely. Now, that testimony is clear. He said that four times.

Mr. Boochever: Well, your Honor, I don't believe I have gotten an answer on my question yet, and I don't think it is proper for counsel—there is nothing improper about my trying to get it straight with the witness. I am not arguing with the witness, and I don't think it is proper for counsel to try to state what the witness is intending to say.

Mr. Renfrew: Well, I submit, your Honor, I will [274] rely on the record. He has answered it three different times.

The Court: Well, but at the same time he has expressed uncertainty about it and, if he had been positive in his answer, then of course the Court could stop any further questions, but, where he has expressed uncertainty, then for the purpose of calling it to his attention or emphasizing something I think the question is proper. The objection is overruled.

Mr. Renfrew: I didn't realize, your Honor, that the answer that, "I can't state. I don't recall," is uncertain.

The Court: His last answer was to the effect that he was uncertain whether there was any call at Mills' office but that, so far as he recalls, nothing of that kind happened, so, so long as he is that un-

(Testimony of Jack Conrad Anderson, Sr.)

certain, he shouldn't be foreclosed from further examination.

Mr. Renfrew: Very well, your Honor.

Q. Mr. Anderson, can you state definitely whether there was such a call to you—it must have been a little something unusual, getting a call from outside while you were in Mr. Mills' office—now, can you recollect one way or the other on that, whether you got such a call or not?

A. I can't. But I know I got the call and I determined—if there was such a thing, it was just more or less—the time we were at the drydock, that is the time I decided, and I asked Mr. Owens what to do, and he said—— [275]

Q. Just excuse me, Mr. Anderson. You aren't answering my question. My question is simply, do you know definitely, can you say definitely "Yes" or "No" as to whether you got that call in Mr. Mills' office? A. Not the first call.

Q. I am not saying the first or second; just, did you get a call in Mr. Mills' office from the Canadian people? A. I don't remember.

Q. You don't remember. That is what I wanted to find out in the first place, is whether you remember. Now, you stated that you were driving Mr. Owens into town in your car, I believe, and that at that time you mentioned something about how he could take the crankshaft, if he ever had to take the crankshaft out, through the funnel; is that right—through, what was it you said—the stack, I mean?

(Testimony of Jack Conrad Anderson, Sr.)

A. We discussed that on the boat also, and on the way in they asked me—we got into a discussion. I don't know if it means anything or not, but we were talking about this and that, how we done it when I was with the Army Transport. Several occasions that happened, and we took the funnel off, took two parts of the manifold off, set the cylinders aside and, I believe, I said, "I believe that is the only way you can take a crankshaft off the boat without damaging it."

Q. Now, Mr. Anderson, that was when you were working on an [276] Army tug; is that right?

A. Well, I was working for the Army Transport Service here.

Q. With a different vessel?

A. Absolutely.

Q. Now, on the payment of five thousand dollars, you state that was left with Mr. Mills; is that correct?

Mr. Renfrew: Your Honor, the——

A. I didn't have it.

Mr. Boochever: I can question the man about it.

Mr. Renfrew: If your Honor please, it is merely to avoid loss of time here on Saturday morning. We are trying to get the case over with. It is in evidence by counsel's own witness, Plaintiffs' Exhibit No. 1, that it was left there.

Mr. Boochever: My question is purely preliminary, in trying to call the man's attention to it.

Mr. Renfrew: We will stipulate it was left with Mr. Chadwick. That will save time.

(Testimony of Jack Conrad Anderson, Sr.)

The Court: Your question probably should assume that as part of the question, and go on with your question, and then it won't be necessary to——

Mr. Boochever: Your Honor, I don't think I have to phrase my questions exactly like counsel wants and, if there is something in evidence and I can save a lot of time——

Mr. Renfrew: You can save just as much time, Mr. [277] Boochever, if you would confine your examination the way it should be instead of a lot of preliminaries.

Q. Mr. Anderson, referring to that five thousand dollar payment, it was paid to you or your account on April 22, 1947; isn't that right?

A. It might have been paid to my account, but I can't recall that because I never seen the check and never handled it. It was done all between Mr. Chadwick and Mr. Owens and the bank. The whole transaction took place there.

Q. Now, your counsel has stated that you received a letter from Mr. Mills dated May 17, 1947. I will ask you to look at that letter and see if that doesn't refresh your memory as to the consummation of that sale and the payment of that money to you on April 22, 1947?

Mr. Renfrew: Now, your Honor, the witness has answered the question, that he never saw the money, it wasn't sent to him, and it was deposited by Mr. Mills presumably in his bank account; that is, the agreement itself states the money was to be sent to a bank designated for the purpose of the appli-

(Testimony of Jack Conrad Anderson, Sr.)

cation of the mortgage; and the witness has testified that he doesn't know when it was sent or when the bank received it. Now, I submit that the best evidence is the bank records and, if counsel wishes to produce those, he can do so, and that is the only possible way that this question can be definitely ascertained. [278]

The Court: I have forgotten the question.

Mr. Boochever: The question, your Honor, was, I wanted to show him a letter and ask him to refresh his memory as to when that money was put in his account.

Mr. Renfrew: We will stipulate that the letter from Mr. Mills says that the transaction was consummated on the 22nd day of April. However, we don't agree that that is true because the only record that Mr. Anderson has does not disclose that fact at all. It shows that the vessel was documented on the 20th day of May and that record is put in evidence. Now, we submit, your Honor, that the only way to prove when this money was paid in accordance with the agreement is the bank record, and that is wholly within counsel's power to produce.

Mr. Boochever: Your Honor, I am certainly entitled to ask this witness on cross-examination whether he knows the date and I can give him anything that may refresh his memory and ask him whether it does and whether he knows that is the date.

The Court: Yes, I think so. If it was incumbent on the plaintiff to prove the exact date when the

(Testimony of Jack Conrad Anderson, Sr.)

money was deposited, it is true that you would have to get the bank records if you couldn't prove it any other way; but for the purpose that he apparently has in mind here the objection will have to be overruled. [279]

Mr. Renfrew: Well, but, your Honor, this witness has testified he doesn't know; he never saw the money; it was sent by Mr. Mills. Here is the letters, the whole file.

The Court: Well, that may be, but counsel has the right to refresh his recollection to see whether or not he will change his testimony.

Mr. Renfrew: How can he refresh his recollection when he has answered that he does not know; he never saw the money; it was left with Mr. Mills and sent by Mr. Mills presumably to the bank.

The Court: Well, that may be the way it will turn out, but he has the right to call his attention to something that he thinks might refresh his recollection.

Mr. Renfrew: And he has asked it, and I have offered to stipulate with him that in that letter Mr. Mills makes the statement that the deal was consummated on the 22nd of April.

The Court: But he has the right to rely upon the possibility that when the witness sees the letter that he will have some recollection of it and, therefore, he isn't limited to what Mr. Mills says. That is the difficulty with the objection.

Mr. Renfrew: Your Honor, I can't follow the

(Testimony of Jack Conrad Anderson, Sr.)
line of reasoning, but I will certainly gladly give the man anything that we have on it. [280]

The Court: Well, it may be that the cross-examination on this point will be entirely unproductive, but nevertheless counsel is entitled to cross-examine on it.

Mr. Boochever: It is the letter of May 17th I am referring to.

Q. Now, Mr. Anderson, will you look at the first paragraph of that letter, please? Does that refresh your memory so that you can recall that this money was turned over to your account on April 22, 1947?

A. I am sorry, but how can I tell you that I know this when I never seen the check? I didn't know when they did it or anything about it. I never had nothing to do with it.

Q. You never had anything to do with it?

A. Nothing to do with that check or anything. All I done was they made an agreement with the bank up here what to do with the money. I sent a wire to Mr. Wells, at that time president of the bank or whatever he was, and he made all the connection with Mr. Owens' attorneys. I don't know whether they sent the check yesterday or ten days ago.

Q. Weren't you notified?

A. I was not notified when they sent it or anything about it.

Q. The bank didn't give you a notice?

A. Not a thing. The bank never gave me anything.

(Testimony of Jack Conrad Anderson, Sr.)

Q. You don't know when that was? [281]

A. That is right. I don't know anything about it. I am sorry.

The Court: Well, you didn't make any inquiries at the bank yourself to find out if any credit of that kind had been given?

A. I am sorry, your Honor. I did write a letter, I believe, to Mr. Wells and I said, "The whole thing is in your hands, and I hope that the bank can act accordingly and see that the payments are credited to us in the proper manner," or something to that effect, but I never heard whether they got the money or anything else.

The Court: Well, suppose the money hadn't been paid under the arrangement that you made with the bank; would you have been notified, or do you know? A. Yes, sir.

Q. You never wrote back to Mr. Mills and said that money wasn't paid on April 22, 1947, did you?

A. I recall one thing. At one time there was some dispute over a check been lost or delayed or something. I don't remember what it was about, but I recall there was a dispute over that the bank didn't get the money.

Q. That wasn't the original five-thousand-dollar payment though?

A. I don't remember what it was. I recall that they didn't get the money.

Q. Now, you state that you left Seattle on June 3, 1947; is [282] that right?

A. That is right.

(Testimony of Jack Conrad Anderson, Sr.)

Q. And when did you arrive in Anchorage?

A. Oh, say about, oh, it takes us probably eight days, I guess, something like that.

Q. What kind of a boat did you have then?

A. Had a power scow.

Q. And self-propelled? A. Yes, sir.

Q. And that is what you went up in; is that right? A. Yes, sir.

Q. And you made the trip in eight days?

A. Well, I don't know. It depends on the weather. I would have to have the logbook. Eight or nine days; the best we have made is about eight days.

Q. Now, until you got to Anchorage, I believe you testified, you never heard from Mr. Owens or Mr. Mills complaining about this transaction; is that right?

A. Let's see, now; no, I think—let's see—something took place. I made a trip to Anchorage for some reason. Excuse me, your Honor; I want to think. On this particular power barge we had a lot of steel for the Road Commission, and it would delay me sometime to get up, and I had to come up on some business. I flew up to Anchorage. What date that was done, I don't know. I believe I left from [283] Seldovia. I am sure I left from Seldovia. My son took the barge up to Kenai. And when I got up to the bank there, I was informed in the bank about some trouble, misrepresentation.

Q. That was the first you heard about any complaint about misrepresentations, is that right, after

(Testimony of Jack Conrad Anderson, Sr.)

you were here in Anchorage? A. Yes.

Q. That was about June 11th; is that right?

A. I know I wrote Mr. Owens a letter about it. I think I went back. Came up one day. We chartered a plane and went back down again, and I wrote Mr. Owens a letter, and it was the first part of June.

Q. Now, isn't it true—well, you left on June 3rd, didn't you?

A. Yes. The 10th or 11th or——

Q. The 10th or 11th when you were up here in Anchorage; isn't that right? And that is the first time you ever knew that Mr. Owens had complained; that was your testimony yesterday, wasn't it? A. Yes.

Q. And that was the first time? Are you sure of that?

A. I am not sure. I can't remember. That was four years ago, and I can't say that I am sure because I am not sure.

Mr. Boochever: Well, now, I would like to look at [284] that letter of June 11th from Mr. Anderson.

Q. Here is your letter of June 11th. It is in evidence as Plaintiffs' Exhibit No. 20, and you stated, "Dear Mr. Owens:"—this is June 11th, written at Seldovia. A. That is right.

Q. That is where you came to from Seattle?

A. That is right.

Q. All right. You said, "We planned on stopping in to see you, but due to the delay in the

(Testimony of Jack Conrad Anderson, Sr.)

shipyard and therefore late in getting loaded, we went straight out from Queen Charollette Sound to Cook Inlet." That is what you said in this letter of June 11th. You left on June 3rd and you went straight out from Queen Charollette Sound to Cook Inlet; that is correct? Is that right? A. Yes.

Q. All right. Then you state, "Our main reason for wanting to see you was to talk over the difficulties you are having with the tug." You can look at this yourself. A. Yes.

Q. How did you know they were having difficulties with the tug if they hadn't notified you about it?

A. When I was down aboard the tug and got this lifeboat, I met the party in charge on board the tug, and he told me that they had some difficulty with the crankshaft, that they were removing the crankshaft or something. [285]

Q. Now, that is the way you knew about it, and that is the only way; is that right?

A. That is right.

Q. And because he said that they were having some difficulty in removing the crankshaft, you were going to talk to Mr. Owens, and that was why and not because Mr. Owens told you that you had misrepresented and that he wanted some restitution; is that correct?

Mr. Renfrew: Your Honor, has there been any testimony here that Mr. Owens told him, that he had talked to him and wanted some restitution?

Mr. Boochever: I am asking the question.

(Testimony of Jack Conrad Anderson, Sr.)

Mr. Renfrew: Well, but Mr. Owens denied that he ever talked to him. There isn't any evidence before the Court that——

Mr. Boochever: I will make that, Mr. Owens or through Mr. Mills, his attorney, if that will satisfy counsel.

Q. In other words, you claim you hadn't heard from Mr. Owens or Mr. Mills, his attorney; is that right? A. I can't remember.

Q. You can't remember. Yesterday you could remember, couldn't you? Yesterday you stated definitely that the first you knew about any difficulty with the tug was when you came in Anchorage and picked up a letter at the Anchorage bank; isn't that right? Don't you remember that? [286]

A. I do.

Q. That is what you said yesterday; is that right? A. That is right.

Q. But today you don't remember; is that right? Is that right, sir? A. That is right.

Q. Now, with counsel's indulgence I would like him to again show you the letter of May 17th written by Mr. Mills to you. Will you look to see where that letter was addressed? Will you read that, please?

A. It was addressed to Olson & Winge Marine Works.

Q. Where? What city? A. Seattle.

Q. That is where you were getting your mail, isn't it? A. That is right.

Q. What is the date of the letter?

(Testimony of Jack Conrad Anderson, Sr.)

A. May 17th.

Q. To whom was it addressed to?

A. To Jack C. Anderson, Jr.

Q. And you didn't know anything about that letter; is that right?

A. Jack Anderson, Sr., too, also. I can't recall that.

Q. All right. That is all I want the letter for right now. Now, Mr. Anderson, in regard to this lifeboat now, you say you had a conversation with Mr. Owens about borrowing it; [287] is that correct? A. That is right.

Q. Where did that conversation take place?

A. That took place—we discussed it in the yard. We discussed it at Olson and Wing's Yard, and we further discussed it in the car going in and—I don't know how it came about—and probably also in the hotel, Hotel Washington.

Q. Now, that was shortly after you sold the vessel to him; isn't that right?

A. I don't believe the deal had gone through yet.

Q. It was before the deal went through that you made arrangements to borrow the lifeboat?

A. I can't recall that, but I know I asked him about the lifeboat and I asked him if he was going to use the lifeboat, and in the discussion we got talking about that—he asked the requirement of a lifeboat, and I also told him, I said, "If you are not handling freight and passengers, all you need

(Testimony of Jack Conrad Anderson, Sr.)

is a lifeboat for the crew." Well, he said he wouldn't need it because there wasn't too much room there and he was going to put a work boat on there.

Q. And he agreed that he would let you borrow it at that time; is that right? A. Yes, sir.

Q. And what was the agreement about returning the lifeboat?

A. I told him, I said, "I have got a lifeboat in Seldovia and [288] I would like to use the boat going north." He said, "That is O.K., and then when you come out why bring the boat back here, and sometime when we come to Seattle I will pick the lifeboat up on a trip to Seattle," or something to that effect.

Q. Something to that effect? A. Yes.

Q. And you saw Mr. Blanchard afterwards, didn't you? A. Yes.

Q. And you borrowed the lifeboat directly from Mr. Blanchard, didn't you?

A. I didn't borrow the lifeboat from Mr. Blanchard. I told Mr. Blanchard I came over to get a lifeboat and made an arrangement with Mr. Owens.

Q. And did you tell Mr. Blanchard that you had made arrangements to borrow it so you could clear Seattle and would leave the lifeboat off at Mr. Owens' camp?

A. No, sir. I could not make those statements. Pardon me for explaining, but how could I take a lifeboat out of here and go out to sea and then

(Testimony of Jack Conrad Anderson, Sr.)

throw the lifeboat off halfways and then keep on going without a lifeboat the rest of the way?

Q. I am not here to answer questions. But you were interested in clearing the Port of Seattle, weren't you? A. That is right. [289]

Q. Now, Mr. Anderson, when did you come back down with that lifeboat?

A. The following fall.

Q. That would be the fall of 1948?

A. That is right.

Q. About a year and a half later; is that right?

A. A year and a half later? I mean the next year, or that same year in the fall.

Q. About six months later then?

A. We have got to be inspected every year.

Q. So it would be about six months later; is that right? A. That is right.

Q. When you went down?

A. That is right.

Q. And at that time where did you leave the lifeboat?

A. I left the lifeboat off at Olson and Wing Shipyard.

Q. Did you write Mr. Owens about that?

A. No, sir.

Q. Did you write Mr. Mills about that?

A. No, sir.

Q. You didn't do that. Just left the lifeboat there; is that right? A. That is right.

Q. Now, prior to that you had received word, hadn't you, that they demanded that lifeboat and

(Testimony of Jack Conrad Anderson, Sr.)

wanted to know why [290] you hadn't returned it, didn't you? A. Yes, I believe I did.

Q. Did you ever answer that? A. No, sir.

Q. Did you ever tell them you returned the boat? A. I don't remember.

Q. Did you ever say anything to them that, "I have the boat still up here but I will return it to you"?

A. No. When I brought the boat in there, I figured he would probably do as he said, he would just go in there and pick the boat up.

Q. So, in spite of the fact that you had a demand for the lifeboat, you never made any reference to it at all, and yet some six months after you borrowed it you put it back there at Olson and Wing, never saying a word, and all the time that this case has been pending for two years you never said a word about it; is that right?

A. That is right.

Q. And you expect us to understand that you thought you were returning the lifeboat to Mr. Owens; is that right?

Mr. Renfrew: I object. That is an improper question, "And you expect us to understand"; that is a statement; that isn't a question.

The Court: Well, it is argumentative.

Mr. Boochever: I will withdraw it. [291]

Q. Actually, Mr. Anderson, you got a letter from Mr. Mills dated July 24, 1947, didn't you? I will ask your counsel to show you that letter, please.

Mr. Renfrew: I don't object to this, your Honor,

(Testimony of Jack Conrad Anderson, Sr.)

excepting that it is improper cross-examination. We didn't go into these letters on direct examination.

Mr. Boochever: You went into the lifeboat.

The Court: Objection will have to be overruled.

Q. Now, if you will refer to the last page of that letter, please, Mr. Anderson. Now refer to the second paragraph from the end. Mr. Mills wrote you and stated: "In addition to these matters, Mr. Anderson borrowed from Mr. Owens a lifeboat off the TP 100 in order that he might get clearance of his vessel from Seattle, promising to return the lifeboat on his way to Anchorage. This he has failed to do, and demand is made for the immediate return of the lifeboat." Do you see that portion of the letter?

A. That is right.

Q. And you got that letter, didn't you? Did you ever say anything, write Mr. Mills, or say, "This wasn't the agreement; I wasn't to leave it on the way up to Anchorage"? Did you ever say anything like that? A. No, sir.

Q. You never did anything about it except six months later approximately, after you got it, you left it at Olson and [292] Wing; is that right?

A. Well, I figured it was necessary, or I mean, if you tell me to do something and I done it, I figured I done what was right; I brought the boat back as you told me to do and——

Q. Now, refer to the last paragraph of that letter. Mr. Mills stated, after this about the lifeboat, he stated: "Request is made that this letter be given

(Testimony of Jack Conrad Anderson, Sr.)

your earliest possible consideration and that you advise this office as to your determination in the matter, as we are under instructions to forward the claim for immediate action unless a compromise can be effected." Now, did you make any reply to that at all?

A. I can't recall whether I did or not.

Mr. Boochever: That is all.

Redirect Examination

By Mr. Renfrew:

Q. Now, Captain Anderson, you have the letter of July 24th before you. How is that letter addressed?

A. Addressed Mr. Jack C. Anderson, Seldovia, and Mr. Jack C. Anderson, Jr., Seldovia, and Seattle National Bank—or First National Bank of Anchorage.

Q. And do you know when you received that?

A. No, sir. [293]

Q. Do you have any idea where you were in July of 1947?

A. No. We travel all over Alaska to the westward, and our work is any place.

Q. Now, I call to your attention the letter of May 17th that Mr. Boochever has asked you about, in which you read the address. Now, will you read the full address? Start in at the top and read the whole address.

A. "Mr. Jack C. Anderson, Jr., c/o Olson &

(Testimony of Jack Conrad Anderson, Sr.)

Winge Marine Works, 4125 Burns Ave. N.W., Seattle, Washington. Mr. Jack C. Anderson, Sr., c/o First National Bank of Anchorage."

Q. Now, is that the letter that you got from the First National Bank of Anchorage when you came to Anchorage in the fore part of June?

A. I believe this is it; yes.

Q. And is that the first word that you received in connection with any claim for misrepresentation of the vessel? A. That is right.

Q. And now, when you referred in your letter of June 11th to the fact that you wanted to stop and see Mr. Owens on your way north, were you referring to——

Mr. Boochever: Wait a second. I don't want counsel to lead. He can ask him what he was referring to but not "were you referring to" some specific thing.

The Court: Yes. I think it is objectionable as leading. [294]

Mr. Renfrew: Well, I hadn't asked the question.

Mr. Boochever: I know it, but you started in a leading form which would suggest the answer, and I objected before you started.

Mr. Renfrew: Well, that is kind of you, counselor, but I still don't think my question would be leading. May I proceed with it?

The Court: Well, usually it is improper to object until the question is concluded, but this

(Testimony of Jack Conrad Anderson, Sr.)

question, so far as it has gone, shows itself to be leading.

Mr. Renfrew: Well, maybe so. I will try and reframe it then, your Honor. I never heard one called leading though until it was asked.

Q. Mr. Boochever asked you why you expected to stop on the way north, if you had had time, and see Mr. Owens about the trouble he was having with the boat. Now, as I understood your answer to that—if I am wrong now, correct me—but, as I understood your answer, you stated that it was because of the difficulty you saw them having, getting the crankshaft out of the tail of the boat, at the time that you went to pick up the lifeboat.

A. That is right; and talking to the chief engineer, and he said they had cut the hatch coaming and things in order to get it out, and I believe, yes, I know I made a statement to him when we were there taking the lifeboat that [295] it should have been taken up through the fiddley and remove the stack.

Q. Now, when you received this letter of July 24th, whenever it was, I want to call your attention to the third paragraph from the bottom.

Mr. Renfrew: Your Honor, since I don't have the advantage of having a copy of this, I am going to have to stand here and read it to him like Mr. Boochever did.

Q. "For the purpose of an immediate compromise and settlement, and for that purpose only,

(Testimony of Jack Conrad Anderson, Sr.)
and without prejudice to the right of Mr. Owens to"——

Mr. Boochever: Well, now, wait a second. If counsel wants the entire letter in, that is all right, but I don't think it is proper for him to produce an offer of compromise which is made without prejudice if he puts this part of the letter in.

Mr. Renfrew: Your Honor, I am not doing it for that purpose, and counsel well knows it.

The Court: Well, even though it would be an exhibit, the Court will disregard it.

Mr. Renfrew: May I proceed, your Honor?

Q. "and for that purpose only, and without prejudice to the right of Mr. Owens to assert his claim for damages to its fullest extent in the event of litigation, Mr. Owens is willing at this time to accept the sum of $10,000.00, and [296] if desired, is agreeable that such amount be credited as an offset against the last $10,000.00 falling due on account of the purchase price of the vessel. In this connection we have advised Mr. Owens that by reason of the notice and knowledge to the First National Bank of Anchorage of the terms and conditions of the sale and the consideration for the promissory note, that any claim for damages constitutes a failure to that extent of consideration and is a proper offset against the promissory note and mortgage." Now, when you got that letter did you consult an attorney? Whenever it was received by you, did you then consult an attorney?

(Testimony of Jack Conrad Anderson, Sr.)

A. Let me see the other part of this letter here. I believe this is a letter I sent to you at Anchorage.

Mr. Renfrew: Now, at this time, your Honor, since the Court has heard these letters from one end to the other, I am going to offer them in evidence.

The Court: Any objection?

Mr. Boochever: No objection.

The Court: They may be admitted.

Mr. Renfrew: That is the letter of May 17th and the letter of July 24th.

The Clerk: Defendants' Exhibits B and C.

DEFENDANTS' EXHIBIT B

Chadwick, Chadwick & Mills
Attorneys at Law
Suite 656 Central Building
Seattle 4

May 17, 1947.

Mr. Jack C. Anderson, Jr.
c/o Olson & Winge Marine Works,
4125 Burns Ave. N.W.,
Seattle, Washington.

Mr. Jack C. Anderson, Sr.,
c/o First National Bank of Anchorage,
Anchorage, Alaska.

Gentlemen:

Mr. A. E. Owens, on behalf of Owens Brothers, has consulted with us with reference to misrepre-

(Testimony of Jack Conrad Anderson, Sr.)

sentations made in connection with the agreement of sale of April 1, 1947, covering TP-100 and the consummation of such sale on April 22, 1947.

Mr. Owens advises that as a representation and as an inducement to him to make the purchase of the said TP-100, it was represented by you that the TP-100 was in good condition and first-class shape, with the following exceptions:

(1) That one crankpin was scored;

(2) That the boat had at some time been grounded and that some minor repairs were needed to the forefoot.

In connection with representation (1) Mr. Owens advises that it was specifically represented by you that the rest of the bearings and the engine were in good shape.

In connection with representation (2) Mr. Owens advises that on several occasions representations were made that the damage from grounding was not extensive and that there were no leaks in the hull.

On tearing down the engine for the purpose of repairing the one scored crankpin it has been determined that all of the main bearings are melted, with the babbitt melted out and that the shaft has been run on bare metal, scoring and badly twisting the shaft and necessitating the installation of a new shaft. On a survey of the hull of the vessel it was found that there was a bad leak in the forepart of the vessel, with water standing in the water-

(Testimony of Jack Conrad Anderson, Sr.)

tight compartment to a depth of four feet, and upon hauling the boat out of the water it has been ascertained that the forefoot has been extensively damaged, requiring complete replacement, and that the forefoot was driven back into the keel, necessitating extensive repairs to the keel of the vessel, and that the forefoot and hull had been badly smashed and were leaking extensively.

The extent of the damage has not yet been ascertained, but a preliminary extimate indicates that it will take in excess of $10,000.00 to repair the engine and in excess of $7,000.00 to repair the forefoot, keel and hull, and that in addition the vessel will be laid up for a period of at least one month for such repairs.

This letter is to advise you that Mr. Owens will look to you in damages for the cost of making such repairs to the forefoot, hull and keel, and for the costs of repairing the engine, as they exceed the sum of $5,000.00 which is the figure which he advises you represented it would take to put the engine in first-class condition.

Very truly yours,

CHADWICK, CHADWICK & MILLS,

By /s/ ORVILLE H. MILLS.

OHM:B

Admitted in evidence March 9, 1951.

(Testimony of Jack Conrad Anderson, Sr.)

DEFENDANTS' EXHIBIT C

Chadwick, Chadwick & Mills
Attorneys at Law
Suite 656 Central Building
Seattle 4

July 24, 1947.

Mr. Jack C. Anderson,
Seldovia, Alaska;

Mr. Jack C. Anderson, Jr.,
Seldovia, Alaska;
The First National Bank of Anchorage,
Anchorage, Alaska.

Gentlemen:

Mr. A. E. Owens, while in Seattle, has handed us the letter of June 11 written by Mr. Jack C. Anderson. Having addressed Mr. Anderson with a claim for damages by reason of misrepresentations and breach of warranties in connection with the sale of the vessel, T.P.100 in May, it was our understanding from him that on his trip back to Anchorage, he would stop by and confer with Mr. Owens in an endeavor to reach an amicable adjustment or understanding with reference to the claim. Unfortunately Mr. Anderson failed to do this.

In connection with the sale of this vessel, there was a definite representation that with the exception of one scored crankpin and a slight damage to the forefoot of the vessel, that the vessel was in first class shape and that $5,000.00 would cover

(Testimony of Jack Conrad Anderson, Sr.)

any necessary repairs to the vessel. There was a further definite representation that the vessel was not taking any water. These representations were made in the presence of Mr. Owens, Mr. Tom Morgan, Mr. Les Hodgins and Mr. H. A. Dent.

Even to the date of his last conversation with us, Mr. Anderson firmly insisted that the vessel had only been shaken up in striking a floating log on the way down from Alaska and that the vessel had not struck a rock or been grounded.

We have personally examined the Log of the T.P.100 and find the entry, under date of February 11, 1947, showing that the boat struck a rock on the way down from Alaska, and in addition, this fact has been confirmed by a member of Mr. Anderson's crew. Upon hauling the vessel out of the water, it was apparent that the damage to the forefoot and keel had been occasioned by the striking of the rock.

Repairs of the vessel are now substantially completed and have required the repair of the forefoot, keel and hull at a cost of $8,620.43.

On taking the engine down, it was ascertained that the crankshaft had been badly burned, warped and twisted, requiring entire replacement for which Owens has now paid $6,356.66.

In addition, as a result of the collision, it was ascertained that the shaking of the boat had caused short circuits which had torn the batteries down, requiring their overhaul at a total expense of $650.00.

(Testimony of Jack Conrad Anderson, Sr.)

The tail shaft was badly scored and oxidized, requiring a complete new installation at a cost of $1,222.04.

In addition to these items, Mr. Owens has disbursed $2,509.00 for men engaged by him for the work in connection with the repair of the vessel and has incurred a sum which he now estimates at $5,000.00 on account of engine overhaul. Accordingly, the total repairs necessitated now amount to $24,358.13 as against Mr. Anderson's assertion that the boat would be in first class shape upon the expenditure of $5,000.00 for repairs. Accordingly, Mr. Owens will look to the sellers for reimbursement to the extent of $19,358.13 as damages by reason of misrepresentation and breach of warranty in connection with the sale of the vessel.

For the purpose of an immediate compromise and settlement, and for that purpose only, and without prejudice to the right of Mr. Owens to assert his claim for damages to its fullest extent in the event of litigation, Mr. Owens is willing at this time to accept the sum of $10,000.00, and if desired, is agreeable that such amount be credited as an offset against the last $10,000.00 falling due on account of the purchase price of the vessel. In this connection we have advised Mr. Owens that by reason of the notice and knowledge to the First National Bank of Anchorage of the terms and conditions of the sale and the consideration for the promissory note, that any claim for damages constitutes a failure to that extent of consideration

(Testimony of Jack Conrad Anderson, Sr.)

and is a proper offset against the promissory note and mortgage.

In addition to these matters, Mr. Anderson borrowed from Mr. Owens a lifeboat off the T.P.100 in order that he might get clearance of his vessel from Seattle, promising to return the lifeboat on his way to Anchorage. This he has failed to do, and demand is made for the immediate return of the lifeboat.

Request is made that this letter be given your earliest possible consideration and that you advise this office as to your determination in the matter, as we are under instructions to forward the claim for immediate action unless a compromise can be effected.

Yours very truly,

CHADWICK, CHADWICK & MILLS,

By /s/ ORVILLE H. MILLS.

OHM:dl

Admitted in evidence March 9, 1951.

Mr. Renfrew: I think that is all. No further questions. [297]

Recross-Examination

By Mr. Boochever:

Q. Now, I believe on your attorney's re-examination there, Mr. Anderson, that you stated that the

(Testimony of Jack Conrad Anderson, Sr.)

reason you wrote the letter of June 11th, after you had come up to Anchorage, to Mr. Owens was not because you had heard about his claim there, as indicated in that letter of his attorney, but because you had seen the crankshaft being removed and you wanted to talk to him about the proper method of removing it; is that right?

Mr. Renfrew: No; now, your Honor, that is an improper question, and I object to it. He says that he believes that is the answer that the witness made, and his recollection is entirely wrong.

Mr. Boochever: The witness can answer that.

Mr. Renfrew: Well, that is improper, Mr. Boochever, for you to make a statement to the witness when that isn't the question nor the answer, and I rely upon the record. That was his reason for making the statement in the letter, that he expected to stop on his way north, if he had had time, to talk to him about the trouble he was having with the boat, and counsel brought that out on cross-examination. On recross he made the same answer that he made to him on cross. And now he is going back into it and trying to have him say that that is the sole reason that he wrote the letter. Now, there [298] is evidence in the record, and plenty of it, that he wrote that letter after he flew from Seldovia, from coming north in the boat to Seldovia, flew to Anchorage, got the letter from the bank here and went back to Seldovia and answered it.

The Court: As I understand it, the principal

(Testimony of Jack Conrad Anderson, Sr.)

ground of your objection is that the question assumes something not in evidence?

Mr. Renfrew: Absolutely, your Honor. He is assuming some statement that the witness didn't make at all. While there is nothing dumb about the witness, it is apparently his first experience in court and he is confused by counsel's insinuations.

The Court: There is a good deal of difference between assuming something that is not in evidence and understanding something that is in evidence, and counsel's question evidently may arise from a misunderstanding of the evidence, but that doesn't make it improper. The objection will be overruled.

Q. Mr. Anderson, what I was trying to get at is, why did you write that letter of June 11th? Did you write it because you wanted to see Mr. Owens about that crankshaft being removed or because you had been informed by Mr. Mills of the difficulties in regard to the boat?

A. I wrote that letter when I came back down from Anchorage. We flew down. We had a plane here, and I flew up and flew [299] back down again, and I discussed the matter with my son, and we wrote him a letter at that time. Now, what the exact reason was—but I know I had some knowledge of it anyway.

Q. In other words, you came up to Seldovia and flew over to Anchorage, flew back to Seldovia, and then wrote the letter; is that right?

(Testimony of Jack Conrad Anderson, Sr.)

A. I believe we wrote the letter in Seldovia; as a matter of fact, I am sure we did.

Q. Did you go back and forth on the same day from Seldovia to Anchorage? A. Yes, I did.

Q. And you wrote the letter the same day?

A. It was a hurry-up trip. There was a reason for it. If I had my logbooks and things, I could probably check on it. I know I couldn't get up here for quite sometime on account of the steel bridge we had on board the power scow.

Q. Now, you say that you wanted to discuss this removal of the crankshaft through the stack; is that right? A. I didn't say I wanted to.

Q. You did want to?

A. No; I didn't say that. I don't believe I said that. I said the proper way of taking the crankshaft out is through the stack. They had to cut out something in the coaming, in the hatch coaming there, in taking the shaft [300] out. They couldn't get clearance for it.

Q. How big is the stack on that boat?

A. It is a pretty big stack.

Q. You have to have a derrick to get it up?

A. A crane; yes.

Q. Quite an operation, isn't it?

A. Well, it isn't any more of an operation than taking the crankshaft out through the stern.

Mr. Boochever: That is all. Excuse me, your Honor, just a second. That is all, your Honor.

Mr. Renfrew: That is all.

JACK CONRAD ANDERSON, JR.

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Will you state your full name, please?

A. Jack Conrad Anderson, Jr.

Q. You are a partner with your father in the operation of the Anderson and Son Transportation Company? A. Yes, sir.

Q. Do you hold any certificates?

A. I have a skipper's certificate; yes.

The Court: You mean master's?

A. Master's; yes. [301]

Q. You have heard most all of the testimony that has gone on in this case. Briefly, Mr. Anderson, when did you and your father purchase the TP 100, roughly?

A. It was March or April of 1946.

Q. Where was the vessel at that time?

A. Seward, Alaska.

Q. Was it on dry dock, on the ways or just laying in the water?

A. No, sir. It was in Thumbs Cove Bay, wet storage.

Q. Thumbs Cove Bay?

A. Thumbs Cove Bay. It is just a bight in the bay at Seward, Resurrection Bay.

Q. And when you say "wet storage," you mean in the water? A. Yes, sir.

(Testimony of Jack Conrad Anderson, Jr.)

Q. And was the vessel in operating condition at that time?

A. Well, she had been laid up by the Army, and we had to fix that—or my dad had to fix that one crankpin before he took her out. I don't know if he needed to, but he did.

Q. Was the vessel used by you people that year?

A. Yes, sir.

Q. Do you know when you took it out of Thumbs Cove?

A. We got the power scow first, and then I left with that and towed some barges around here. I don't know exactly the date my dad took it out.

Q. Well, could you give us a rough estimate? What month? [302]

A. March. No; it would be in April, I believe; the last part of March or the first of April.

Q. And then you used the vessel here in the Inlet for transportation during that summer?

A. Yes, sir.

Q. Now, do you know whether or not you had any trouble with it all summer long?

A. Oh, off and on with any boat like that you have minor repairs to do, and that one bearing gave them a little trouble, but they used that cylinder during the summer.

Q. And do you know the approximate time that it went south? I think it has been testified here as about February 10th.

A. Yes, sir. We both went down at the same time.

(Testimony of Jack Conrad Anderson, Jr.)

Q. And you were in charge of the power scow?

A. Yes, sir.

Q. And do you know of your own knowledge that they hung up this number three piston before they took off for the States?

A. Yes, sir. I was on the power scow, and I was laying in Seldovia getting gear and stuff aboard while they made this trip across, and I made an oil trip to haul some oil. I left Seldovia there while they done that and, when I came back, they had it done.

Q. Now, on the trip south did the power scow and the TP 100 go close together all the way?

A. Well, we started out, and they ran away from me. They made [303] better time than we did, so we slowed down and put the towline on the tug TP 100 on the power scow and towed it about three-quarters of the way across the Gulf, and we got in a storm out there and had to cut loose, and then they towed us again, after we got inside, several times.

Q. Were you anywheres in the vicinity when they ran into this rock or reef or shoal or whatever it was?

A. It was dark that night and snowing also, and I was quite aways behind.

Q. And do you know what happened immediately after that?

A. By the time I got up there he was laying still in the water. I came alongside, and they said they had a little trouble, and he said, "We

(Testimony of Jack Conrad Anderson, Jr.)

better not go any further tonight," so we went across, I believe it was Lynn Canal, to this Funter Bay. It was right across there, and anchored that night.

Q. And did you have an occasion at that time to look at the TP 100 and see if there was any damage or not?

A. We tried looking around as much as we could see. It was black at night, and we couldn't see much.

Q. What about the next morning?

A. Yes, sir. We looked at it the next morning. We could see a few slivers underneath the bow. Other than that why—I went down in the engine room, and there was no water in the engine room, so we went on. [304]

Q. And did you continue on together then to Ketchikan? A. Yes, sir.

Q. And did the TP 100 assist you any more with tows?

A. On and off when we got in these open spots, we did; yes, sir; but when we got in a narrow spot, why we ran separate.

Q. And subsequently you arrived in Seattle; is that correct? A. Yes, sir.

Q. And where did you dock there?

A. The first night we docked at Ballard Fishermen's Dock, and I believe it was the next day or two we went over to Olson and Wing's.

Q. And was the power scow and the TP 100 together when you were at the Fishermen's Dock?

(Testimony of Jack Conrad Anderson, Jr.)

A. Yes, sir, both places, all the time. We had both the boats together at all times.

Q. I see. Now, did you become acquainted with Mr. Owens shortly thereafter or sometime within the next month or so? A. Yes, sir.

Q. And how did you become acquainted with Mr. Owens?

A. He was down on the dock. There were several people around there on the waterfront looking at these surplus boats, and he happened to be one of them that came down and looked. The first time I believe I seen him he was on the [305] boat, and we were putting a new galley range in the power scow, and I believe the first time I seen him that I can remember is he was on the stern of the boat.

Q. I got a little ahead there. Before you saw Mr. Owens, did you make any effort to determine the cost of the repair of the damage to the TP 100?

A. Yes, sir. "Squeaky" Anderson had a similar trouble with one of his boats, the Marine Greer, hitting a rock on the way down, and from what it cost them we determined from the shipyard, what we could see down in the water, it was a similar accident, and then that, and the yard wasn't very busy, and they wanted to do this work, and they said they would fix up the bow and the crankpin for about five thousand dollars, he said.

Q. Now, who was that?

A. Young Wing; I can't remember his first name.

(Testimony of Jack Conrad Anderson, Jr.)

Q. I mean, was that the Olson and Wing Dry Dock? A. Yes, sir.

Q. And had they just completed the repairs on the Greer? A. Yes, sir.

Q. And that was another vessel from Seldovia, was it?

A. That is "Squeaky" Anderson's boat; yes.

Q. Well, but the Court doesn't probably know "Squeaky" Anderson. Maybe he does.

The Court: I know him, but I guess I would have to [306] know his boat to be of any value here.

A. I believe it is a one-hundred-and-fifteen-foot boat, right around there; between one-hundred-and-ten and one-hundred-and-fifteen-foot.

Q. A larger boat than the TP was?

A. It was longer.

Q. Was it an Army Surplus boat?

A. Yes, sir.

Q. Now, were you there when you had any conversation; when your father had any conversation with Mr. Owens, were you present?

A. Yes, sir. I showed him around this day that he came down, and he looked around the boat. I don't know if my dad was down there right then or not; and Harry Saindon and I and, I believe, another crew member were putting in this galley range, and I thought Harry Saindon went up to the bow. We showed him down where he could see in the water. It was murky, but you could see down there where there were splinters sticking out of the bow where the bow had been damaged, and we

(Testimony of Jack Conrad Anderson, Jr.)

showed him that, and we told him one piston was haywire and the crankpin, or web journal or whatever you want to call it, was haywire and had to be fixed, turned down. It was rough, so it wouldn't hold the bearing, so we had to turn it down and put in a new bearing or have the bearing [307] rebabbitted.

Q. Now, did you ever see Mr. Owens again?

A. Yes. He was down several times, and my dad talked to him more than I really did. This one day Harry Saindon and I and my dad were up there when this phone call came through from Canada while all three of us, or four of us rather, were standing out there then.

Q. On the dock?

A. Well, it was between the warehouse and the office. They have this loud-speaker system all around the shipyard there.

Q. How do you know that that was a phone call from Canada to your father?

A. My dad said so.

Mr. Boochever: I object to what his dad said.

The Court: Yes.

Q. Well, do you know any other way that what your father said?

A. Yes, sir. We were dealing with this Canadian firm, and my dad didn't know which way to turn, whether we should sell it to Mr. Owens. We were sweating it out for this Canadian firm to call us back, and we didn't know for sure whether Mr. Owens was coming back to get it either.

(Testimony of Jack Conrad Anderson, Jr.)

Q. Do you know whether or not Mr. Owens was there when that took place?

A. Yes, sir. All four of us were standing out there. [308]

Q. And do you know when the deal was agreed upon, that it be sold to Mr. Owens?

A. Yes, sir. My dad came back out then and said that he was going to go up and make a deal with Mr. Owens.

Mr. Boochever: I object to what his father said unless it is shown that it was in the presence of Mr. Owens.

Mr. Renfrew: It was in the presence of Mr. Owens. He said definitely Mr. Owens was there.

Mr. Boochever: I still make my objection.

Mr. Renfrew: I guess we are waiting for your Honor to rule.

Mr. Boochever: I have objected, your Honor, to anything that his dad said unless it is shown that it was in the presence of Mr. Owens.

The Court: Well, I thought that obviated a ruling by the Court, unless it is shown to be in the presence of the plaintiff.

Mr. Renfrew: I maintain he has said so.

Mr. Boochever: Well, I don't think it is up to counsel to testify for his witness. He can ask his witness that if he wants to.

Mr. Renfrew: I asked him, and he has said, "Yes." I can't keep counsel from objecting, your Honor.

The Court: Well, you mean that he has already

(Testimony of Jack Conrad Anderson, Jr.)

testified that the plaintiff was present? [309]

Mr. Renfrew: Yes. He said that Mr. Owens was standing right there.

Mr. Boochever: Well, your Honor, my recollection may be wrong, but my recollection is he said the "four of us" were there and then the phone call came, and then he said, "Dad came back and told me." Now at that point I don't know whether Mr. Owens was with him or not.

Q. Now, you understand, Mr. Anderson, that Mr. Boochever has objected and that the rule of law is that you are not to testify to anything that anyone said to you excepting in the presence of Mr. Owens who is sitting to Mr. Boochever's right over here on the end. Now, just before he made the objection a moment ago, I asked you if Mr. Owens was there. What was your answer?

A. Yes, sir. My dad and Mr. Owens came back out of this dry dock office there. We were standing right outside there, Harry Saindon and I, and my dad said that——

Q. That is all right now. You can say what your dad said as long as Mr. Owens was there.

A. He said then he was going to make the deal with Mr. Owens.

Q. Now, had you ever heard any conversation between your father and Mr. Owens at that time or at any previous time as to what the terms of the deal were?

A. Yes, sir. That was previous to that time

(Testimony of Jack Conrad Anderson, Jr.)
they were talking about whether we should fix the boat up, fix this [310] crankpin, or web journal or whatever you want to call it, up and the bow, or they were going to do it, and that is where the question was previous to that time.

Q. Now, was that in a conversation in which you were present and you heard Mr. Owens and your father discussing it? A. Yes, sir.

Mr. Boochever: I believe that is repetitious, your Honor.

Mr. Renfrew: Well, your Honor, I can't possibly proceed with this examination and get it over with if counsel is going to object every time I make a suggestion. I am trying to hurry it up, not trying to delay it. I can stay here and object and delay this thing for weeks now. I am getting a little disgusted with this. If it was a trial before a jury or something, your Honor, I would feel there was some merit in counsel's contentions, but I am only trying to speed the trial up, and I hope the Court knows that.

The Court: On the other hand, even without a jury, I can't stop counsel from making an objection.

Mr. Renfrew: I realize you can't stop him, your Honor, but I thought perhaps you might explain to him that this is a matter just before the Court. He apparently thinks there is a jury here some place.

Q. Now, would you repeat any conversation, as near as you can, that you heard between your

(Testimony of Jack Conrad Anderson, Sr.)

father and Mr. Owens [311] with regard to the purchase price of this vessel, or the terms of the agreement, let's say?

A. I don't get how you mean. What we finally decided on, or previous to that?

Q. Any conversations that you heard between your father and Mr. Owens when you were present, whether it was previous to this time or at this time, with regard to how you proposed to sell the boat to him or how he proposed to buy it or when they were dealing with the sale of the boat, what you heard, if anything?

A. It would be thirty thousand dollars, ten thousand dollars down and two thousand a month, if we fixed the boat, and then my dad gave him that alternative, or they take the boat as she was for twenty-five thousand, five thousand down and two thousand a month.

Q. Now, did you hear that conversation?

A. Yes, sir.

Q. And when was that, if you recall?

A. That was, I believe, that morning in front of the office out there.

Q. Well, now, after this telephone call came in, was there any discussion then that you overheard as to which way Mr. Owens was going to buy the boat?

A. Not in the presence of Mr. Owens. My dad said——

Mr. Boochever: I object. [312]

(Testimony of Jack Conrad Anderson, Sr.)

Q. If you didn't hear that discussion in the presence of Mr. Owens, why don't you state what it was. Now, did you at Mr. Owens' request remove the boat from its location at Olson and Wing's?

A. Yes, sir. We went up and signed these papers—I also had to sign them—in Mr. Chadwick's office, and Mr. Owens wanted the boat moved over to this other place, other dock, where he could get the work done, so he came down, and we started the engine up and so we put the heavy lines on the boat, direct reversible; we had to warm her up a little bit at the dock in order before you start out—we warmed her up a little bit at the dock for a little while; and then Mr. Owens wanted to know if I would run the boat over for him because he said he doesn't run a boat or something like that, wasn't a skipper on a boat or something like that—I don't remember the exact words—but he asked me to run it because he didn't want to run it in the lake, so I told him I would, so as soon as the engine was warmed up why we cut loose and went over there. He was up in the wheelhouse most of the time with me. I don't know whether he went down below at all or not. He was out on deck and looked around and was in the wheelhouse with me, but I stayed in the wheelhouse, and we talked over how she run and how she handled and so forth.

Q. Now, you signed papers in connection with the sale of this [313] vessel, did you not?

A. Yes, sir.

Q. And was that in Mr. Mills' office?

(Testimony of Jack Conrad Anderson, Sr.)

A. Yes, sir.

Q. And was Mr. Owens and your father present there at that time? A. Yes, sir.

Q. Now, do you recall any telephone call coming into that office to your father at that time?

A. No, sir. I don't believe anybody knew we were up there.

Q. Is that the only time you were ever in Mr. Mills' office?

A. We had to go up a couple of times to get these papers signed. I believe we went up twice.

Q. You mean—was that after the sale was consummated, or rather after you agreed to make the sale but before it was consummated?

A. We went up there. It was all agreed on when we went up there. They were drawing up the papers then.

Q. You feel that you were there two times in Mills' office? A. Yes, sir.

Q. And your father was there both times?

A. Yes, sir.

Q. Now, on either of those occasions do you recall any telephone call coming in to your father?

A. No, sir; not that I recall. [314]

Q. Now, were you present when—were you present or did you overhear any conversation between your father and Mr. Owens in connection with the borrowing of a lifeboat?

A. No, sir. I wasn't there when he borrowed it. When we first, after this conversation outside the dry dock, Harry Saindon and my dad and Mr.

(Testimony of Jack Conrad Anderson, Sr.)

Owens and I were out there; I couldn't recall all we talked about. They talked about everything on these boats and all that, and I don't recall whether the lifeboat was mentioned right then or not. It could have been, but Harry Saindon and I were talking because he was figuring on leaving for some place—I don't know—outside the State.

Q. You don't recall any conversation about the lifeboat at that time at all?

A. It could have been going on, and I didn't hear it.

Q. Now, were you present when the lifeboat was picked up? A. Yes, sir.

Q. And now, how was that accomplished? Where was the lifeboat picked up?

A. They had this boat over where we delivered it at the Stikine Fish Company Dock, or whatever you call it, and just before we got ready to leave we needed this lifeboat, and it had been previously arranged. We were going over, but the engine on the power scow was taken down, and we couldn't go any sooner. As soon as we got the engine [315] overhauled we went over.

Q. What do you mean, shortly before you left?

A. I would say about four or five days. We went over and picked the lifeboat up and then went out of the lake and loaded up and left.

Q. I still don't know what you mean by leaving. Leave for where? A. Alaska here.

Q. What was the day, if you recall, that you left for Alaska? A. June 3rd, I believe.

(Testimony of Jack Conrad Anderson, Sr.)

Q. And then am I to understand that, when you said four or five days before you left, you meant you got the lifeboat four or five days before June 3rd? A. Yes, sir.

Q. And do you remember—you say you were present when you went and got it?

A. Yes, sir.

Q. And were you present, or, do you know whatever became of that lifeboat? Did you take it to Alaska with you? A. Yes, sir.

Q. And was it on the power scow all summer?

A. Yes, sir.

Q. And what became of it subsequently, if you know from your own knowledge?

A. Yes, sir. We brought it back to Olson and Wing and unloaded [316] it there that fall.

Q. When you came down in the fall?

A. Yes, sir.

Mr. Renfrew: Now, Defendants' Exhibit B; let me see the other letter too.

Q. Now, I hand you Defendants' Exhibit B and I ask you to look at the address on that letter. Where is that letter addressed?

A. "Mr. Jack C. Anderson, Jr., c/o Olson & Winge Marine Works, 4125 Burns Ave. N. W., Seattle, Washington."

Q. And there is also a further address, is there not?

A. Yes, sir. To "Mr. Jack C. Anderson, Sr., c/o First National Bank of Anchorage, Anchorage, Alaska."

(Testimony of Jack Conrad Anderson, Sr.)

Q. I will ask you to look that letter through, Mr. Anderson, and tell me if you ever received that letter at the Olson and Wing Shipyards in Seattle.

A. No, sir; I don't recall seeing this letter before.

Q. If you had gotten that letter in Seattle, wouldn't you have known it? A. Yes, sir.

Q. Now, did you or did you not get that letter?

A. No, sir; we never got a letter out there like this.

Q. And when was the first you ever knew of that letter?

A. When we came back up here. My dad flew up and came back down and said we were being sued for selling the boat. [317]

Q. Now, you say when he flew up. Flew up from where? A. Seldovia.

Q. Do I understand that you brought your boat back from Seattle to Seldovia and then he flew from Seldovia to Anchorage and back to Seldovia again?

A. Yes, sir; while we were unloading. We had quite a little cargo for Seldovia and, while we were unloading the cargo, he flew up here.

Q. Now, I hand you Defendants' Exhibit C and I will call your attention to the fact that the address on that is Seldovia, Alaska. Now, did you or did you not get that letter?

A. Yes, sir; this is the one. I think I got this letter and sent it up to you. I either sent it up

(Testimony of Jack Conrad Anderson, Jr.)

or my dad came up. I don't remember which. That is when we started in giving you the papers.

The Court: Well, you don't know what happened to the copy of the other letter addressed to you at Olson and Wing? A. No, sir.

The Court: If it was delivered to Olson and Wing, then Olson and Wing never forwarded it to you? A. That is possible.

The Court: Did they know your headquarters was Seldovia?

A. Out in Seattle most of our mail is sent to Anchorage. We [318] give our address, in Seattle we give it as Anchorage. Everybody know where Anchorage is.

The Court: Well, but that isn't my question. Did they know that your headquarters or home was in Seldovia? A. Yes, sir.

The Court: Then you don't know why they didn't forward it either by way of Anchorage or to Seldovia? A. No, sir.

The Court: If they received the letter, they must have overlooked doing anything with it, as far as you know?

A. Yes, sir. They did forward a lot of mail up to us at Seldovia.

The Court: But that letter was not among the mail forwarded?

A. No, sir; not unless it was later, when the mail got up here, and they had already found out about the letter, when my dad came up here; that was the first we found out was when he came up here.

The Court: That is all.

(Testimony of Jack Conrad Anderson, Jr.)

Mr. Renfrew: I just wish to call the Court's attention that a copy of this or an original went to the First National Bank at Anchorage; that is the letter of July 24th.

The Court: Yes, I know. But I just wondered why the other copy or original, whatever it was that was apparently addressed to them in care of Olson and Wing, never got to [319] its destination.

Mr. Renfrew: There is nothing on the—I wish to call the Court's attention—my question—there is nothing on the letter to indicate that there was ever a carbon copy at all. The letter does not show that a copy was ever even made.

The Court: Well, but it was addressed, as I understand it, to the defendant or defendants in two places, and presumably it couldn't have been addressed to them in two places if there was just one copy.

Mr. Renfrew: Your Honor, it could be addressed with a forwarding address. Your Honor can examine the exhibits by yourself, one letter, and it doesn't indicate that there was any copy that could possibly have been sent addressed one place with a forwarding address to the other; it is possible; since it doesn't show that there were any copies, that could have happened. I think that is all.

Cross-Examination

By Mr. Boochever:

Q. Mr. Anderson, when did you arrive in Seldovia on that trip north?

(Testimony of Jack Conrad Anderson, Jr.)

A. That was a very fast trip in the middle of the summer, good weather, and we shot straight out from, I believe it was Queen Charolette, came straight across the Gulf.

The Court: Well, you don't need to mention anything [320] that happened in between time. Just say what time you arrived, if you know. The question is not what the weather was.

A. I would say about the 9th or 10th.

Q. About the 9th or 10th of June; is that right?

A. Yes, sir.

Q. And your father left immediately for Anchorage and came right back; is that right?

A. Yes, sir.

Q. And you left Seattle June 3rd, is that right, in the power scow? A. Yes, sir.

Q. And you arrived the 9th, and you took just six days to get up there?

A. It must have been seven days. It must have been the 10th.

Q. Your father, I believe, said the 11th?

A. We have made it in seven days.

Q. The 10th or 11th you arrived then?

A. Yes, sir.

Q. Now, you heard your father state that he wrote a letter June 11th to Mr. Owens. Did he discuss that letter with you and show it to you? This is the letter he wrote to Mr. A. E. Owens, June 11th, 1947.

Mr. Renfrew: I ask that he show the letter to the witness, your Honor.

(Testimony of Jack Conrad Anderson, Jr.)

The Court: Well, he is not asking him as to the [321] contents yet.

Mr. Renfrew: He asked him whether he discussed it with him.

Mr. Boochever: That is right.

The Court: Well, the letter has been discussed here in evidence. Do you remember the letter, or do you have to see it?

A. Well, my dad, when he came back, he told me what he found out when he got to Anchorage here and he was going to write a letter.

Q. Now, your dad states in that letter of June 11th: "We planned on stopping in to see you," to Mr. Owens, "but due to the delay in the shipyard and therefore late in getting loaded, we went straight out from Queen Charollette Sound to Cook Inlet. Our main reason for wanting to see you was to talk over the difficulties you are having with the tug. We had a letter from Mr. Mills stating that we misrepresented and induced you to purchase the TP-100, which no doubt you know we never did." Now, the only reason your dad stated—what was the reason your dad stated you were going to see Mr. Owens before you left Seattle?

Mr. Renfrew: Now, we object to that as argumentative and calling for a conclusion. He says, "What was the reason your dad" did this. How could he answer that? [322]

Mr. Boochever: I will reframe the question.

Q. Do you know the reason why your dad was going to stop and see Mr. Owens before you left Seattle?

(Testimony of Jack Conrad Anderson, Jr.)

A. It was common word through the grapevine in Seattle that they were doing all kinds of work to the tug. Everybody knew it on the waterfront. When a boat is getting fixed, everybody knows it.

Q. But you want the Court to believe that you had no word from Mr. Owens or Mr. Mills, that you hadn't received that letter of May 17th; is that correct? A. Not to my knowledge.

Q. Not to your knowledge?

A. I hadn't received that letter.

Q. In other words, your dad just wanted to see him because he heard through the grapevine that they were making repairs on the tug and wanted to see him?

Mr. Renfrew: Now, we object to this, your Honor, as calling for a conclusion as to why his father wanted to see him. He says, "In other words, your father wanted to see him because." It is opinion only.

The Court: Well, that would be a valid objection if it wasn't for the relationship of these two people. They are co-defendants here, aren't they, and are associated together there, so, if he knows, he may answer.

A. What was the question again? [323]

Mr. Boochever: I have forgotten it now. I will waive it. I think we have covered the point anyway.

Q. Now, you state that in regard to determining this five-thousand-dollar repair of the boat, you determined that is what it would cost to fix up the

(Testimony of Jack Conrad Anderson, Jr.)

cylinder, in your opinion, and the front end; is that right? A. Yes, sir.

Q. And the basis for determining those damages and getting that estimate, you say, was because the boat yard had fixed up the vessel of "Squeaky" Anderson who had also struck a rock; is that right? A. Yes, sir.

Q. Mr. Anderson, did you have the boat out on dry dock so that they could see the damage done by the rock? A. No, sir.

Q. Are you implying then that all vessels, the same type of vessels, if they strike a rock, have the same type of damages?

A. No, sir. But we could look down through the water. In Lake Union it is fresh water. You could see down there and see more or less what it looked like. And he said about what it was going to cost; he didn't say exactly.

Q. In other words, you never did have it out on dry dock at that time to see the real extent of the damage? A. No, sir. [324]

The Court: Well, did you have any information or knowledge of the kind of damage that was done to "Squeaky" Anderson's boat?

A. Yes, sir. We seen that on dry dock.

The Court: You saw that?

A. Yes, sir. And we seen the other one through the water; I mean, the way it reflects.

Q. And that was why you told Mr. Owens that it would cost just five thousand dollars to repair the boat?

(Testimony of Jack Conrad Anderson, Jr.)

Mr. Renfrew: Now, I object to this, your Honor. There isn't one shred of testimony that he told Mr. Owens anything.

Q. That you or your father—I meant to say.

Mr. Renfrew: And now, then, he is assuming that he knows why his father told him something, and it hasn't been testified even that his father told him. Now, that is improper cross-examination even if this man is a co-defendant.

The Court: Well, unless he was present at the time so that he would know what his father told him at the time——

Mr. Renfrew: But your Honor, he says "that is why your father told you that."

Mr. Boochever: I will rephrase the question.

Q. You heard your father tell Mr. Owens, didn't you, that it would cost approximately five thousand dollars to repair the vessel there; isn't that right? [325]

A. To do these two jobs; yes, sir.

Q. And those are the only two jobs that your father stated needed to be done on the vessel; isn't that right?

A. That is the only two jobs we agreed that would do her to put her in running condition. The engine was already running, but the one cylinder wasn't running, so we figured that that should be repaired and also the bow.

Q. And the agreement—you stated, I believe, you were present at one time when you discussed the terms; isn't that right? A. Yes, sir.

(Testimony of Jack Conrad Anderson, Jr.)

Q. And at that time didn't you agree that you would make the repairs on the vessel and sell it to him for thirty thousand dollars, is that correct, as one of the terms? A. Yes, sir.

Q. And in the alternative that Mr. Owens would make the repair on the vessel and it would be twenty-five thousand dollars; is that right?

A. Yes, sir; and he takes her the way she was.

Q. Now, you state that you went to get the lifeboat four or five days before you left Seattle; is that correct? A. Yes, sir.

Q. That would be then about the very last day of May? A. The last part of May; yes.

Q. May 29th, 30th, around in there; is that right?

A. Yes, sir; the last part of the month, within four or five [326] days.

Q. And you say it was at the Stikine Float that you picked up the vessel; isn't that correct?

A. Yes, sir.

Q. Mr. Anderson, don't you know that they moved the vessel from the Stikine Float prior to that in order to get it up on dry dock in the middle of May?

A. Yes, sir. I seen her when she was up on dry dock.

Q. And, therefore, you got it before it was up on dry dock, didn't you? You got the lifeboat?

A. No, sir; the boat was back over there again.

Mr. Boochever: That is all, your Honor.

Mr. Renfrew: That is all.

(Testimony of Jack Conrad Anderson, Jr.)

The Court: Well, now, this report that you heard, about the extent of repairs that were being made on the boat, through the grapevine, so-called, did that concern the fact that the repairs that were being made were extensive or was it concerned also with the fact that the condition of the boat made the repairs that extensive?

A. The way they were doing the work, why it either seemed like they didn't have a qualified man supervising the job or else they had oodles of money and didn't care how much it cost. Common waterfront talk; everybody talks about everybody's boats and, since we had that boat, why——

The Court: There wasn't anything in this grapevine [327] report to the effect that the plaintiff was complaining about the repairs that were necessitated?

A. No, sir. The only thing we knew was that he was taking the crankshaft out. The engine was already in running condition except this one there. If they put that other bearing in, he could have run the engine that way.

The Court: Well, then the impression created by this grapevine report was that they were extravagant in making repairs; was that it?

A. Yes, sir. They never tried running it the way we run it. We run her down on five cylinders. If they put the other one in, she would have still run.

The Court: Well, in other words, so long as it would run, why, in your opinion, that would be sufficient; is that it?

(Testimony of Jack Conrad Anderson, Jr.)

A. Yes, sir. It was in running condition. It is hard telling how long an engine like that lasts. If they take good care of it, it might last quite a while. It was in running condition when we took it over there. We showed him how it run on five cylinders. It run good.

The Court: Well, then from what you say all they had to do was to repair the journal and connect this cylinder up and they could keep on using the boat in that condition indefinitely?

A. Yes, sir; if they took good care of the engine and give [328] it plenty oil and stuff. Without oil, naturally it would burn up. If they had a competent engineer, why——

The Court: All the while you operated her, there was nothing in the operation of the engine that indicated the crankshaft was warped or out of line or anything like that?

A. No, sir. This one journal was scored and it had to be trued up, and it was such a big crankshaft we couldn't get a tool to fit around it.

The Court: Well, would it be correct to say then that even though a crankshaft is somewhat warped that it can be operated in that condition indefinitely?

A. Sir, there is no way of telling whether the shaft was warped, except taking it out.

The Court: But, I say, assuming it to be warped and if you knew that, would you still say that it could be operated indefinitely, that it would be all right to operate it?

(Testimony of Jack Conrad Anderson, Jr.)

A. No engine could be operated indefinitely, sir, without an overhang or overhauling. We overhaul our boats every year, annual overhaul.

The Court: Well, then am I to understand that the crankshaft could be warped and still that defect could not be detected by an experienced engineer when he listens to the engine running?

A. No, sir; you could not tell it from the engine running. [329]

The Court: Then, so far as anybody could discern, the only thing that could be wrong with the engine would be the journal itself?

A. Yes, sir. That definitely had to be worked on.

The Court: That is all.

Mr. Renfrew: That is all. Now, your Honor, with the exception of the depositions we wish to take, that concludes our case.

The Court: Have you any rebuttal?

Mr. Boochever: Your Honor, I wonder if we could have a few minutes' recess. If we can possibly avoid it, we will.

The Court: Well, I was just wondering if there is time left before noon.

Mr. Boochever: Well, I was hoping I might be able to end it before noon. If I could have about two minutes' recess just to talk with my fellow counsel here about the rebuttal and if it is possible to eliminate it, we shall.

The Court: I just thought that, if you couldn't

finish your rebuttal in any event before noon, why we could go over to 1:30; that is all.

Mr. Boochever: We do think we can get through by 1:30; we can without a doubt.

Whereupon Court recessed until called by counsel, reconvening as per recess, with all parties present as [330] heretofore; whereupon the trial proceeded as follows:

Mr. Boochever: Your Honor, we have a short rebuttal. I want to call Mr. Blanchard.

Mr. Renfrew: Your Honor, before we start with the rebuttal, Mr. Boochever just mentioned to me the question of argument. Now, if we are going to argue this thing, it seems rather foolish to me to continue at this time and then go and get a bowl of soup and then come back and argue. I am willing to do two things. I am willing to argue this matter on Monday if your Honor is inclined to stay over here and conclude the case, or I am willing that it be submitted on briefs after the testimony of the other witnesses is secured by deposition.

Mr. Boochever: I am willing to agree to either of those and, since I assume your Honor would prefer leaving Monday, why it is satisfactory to present argument on briefs after the depositions are taken.

The Court: Well, do you mean that you would sum up the evidence and argue it in writing; is that what you have in mind?

Mr. Renfrew: Yes.

Mr. Boochever: I also would be willing to waive argument.

Mr. Renfrew: Why don't we waive argument?

The Court: I would rather not have you waive argument. I think that you ought to sum up the evidence in the [331] way that you think it should be summed up, and usually counsel have certain points that they want to emphasize which they think has support in the evidence, and the Court might overlook some of those. I am always in favor of full argument of the evidence, particularly if counsel wish to argue it, and it is immaterial, however, whether you wish to do it in writing or orally, although, if it is done orally, it seems to me, why couldn't it be done this afternoon?

Mr. Renfrew: Well, I don't wish to argue the case, your Honor, in view of all the testimony not being in.

The Court: Well, but what remains to be put in would be only a small part of it and, if you argue the testimony that is in, then of course the Court wouldn't need the argument on the depositions.

Mr. Renfrew: Well, then let's recess, your Honor. If we are going to argue this afternoon, what is the use of going on now. I mean, I would like to get out of here for a few minutes. I haven't had breakfast yet. It is after twelve o'clock and, if we are going to keep the Court here this afternoon, why it will be five o'clock before we get out of here if we don't start until two.

The Court: Well, is there any objection to arguing the case this afternoon?

Mr. Boochever: I have no objection.

Mr. Renfrew: I have objection seriously. I don't [332] wish to argue the case this afternoon. I am only consenting to it because I understand that the Court wants to leave here, and I have a lot of other things, your Honor, that I had planned to do. As you well know, this is about the only time that an attorney in Anchorage can get anything done in his office, is on Saturday afternoon, particularly when he is in court all week, such as I have been. But I realize that your Honor is trying to get out of here, and I certainly don't want to hold you up, and that is why I am willing to stay, but I don't feel that we should stay here now and run straight through until four or five o'clock.

The Court: Well, the Court didn't have that in mind, but——

Mr. Renfrew: If Mr. Boochever thinks that he can conclude his rebuttal testimony, as he told me, in ten or fifteen minutes, why I am willing to stay for that and then go prepare for the argument, and I will be glad to do that because that will give us a little time after all the testimony is in to prepare for the argument; but this is an important case, your Honor; a considerable amount of money is involved here; and even though I yield to the Court's desire to get home, and I want to assist in every way I can, but at the same time I feel obligated to my clients to give them the benefit of everything that they have coming to them. Now, I am willing to proceed. [333]

The Court: Well, the Court wouldn't even sug-

gest going on this afternoon were it not for the fact that the whole party had planned on leaving, first on Saturday, and then, when we couldn't get through with this case, we made it Sunday, and I think that, balancing relative conveniences and inconveniences, there wouldn't be any difficulty in deciding in favor of leaving Sunday morning, so I think that we should go on with the argument this afternoon.

Mr. Boochever: Your Honor, I certainly don't want to inconvenience counsel or the Court, but I am perfectly satisfied, if the Court feels that it would be just as advantageous, to submit arguments in writing after all the testimony is in.

The Court: Would you prefer that?

Mr. Boochever: I have no definite interest to it being one way or the other.

Mr. Renfrew: I would if I am not limited too strongly as to time, your Honor. The Court is familiar with the calendar here from now on, and I have got to have some time. I will yield to that.

The Court: Well, won't you have plenty of time pending the taking and receipt of the depositions?

Mr. Renfrew: Well, I will have some time; yes, your Honor, but I say I would like to have—I wouldn't like to be limited too strictly on the time because, even though [334] I will have some time between the taking of the depositions and the arguments, your Honor knows about the court schedule here, and I am trying to tell you that I am in court almost every day for the next three or four weeks,

and I start Tuesday morning with criminal cases here in this court and, for some unknown reason, it seems that I have a number of them set in a row. Now, that is the only thing that I want to call the Court's attention to. I am not trying to stall, your Honor, and even if I could come to Juneau to argue this matter to convenience you and Mr. Boochever, but I wouldn't like to be limited too strictly as to the time for the argument.

The Court: Well, since the Court can't decide the case until after the receipt of the depositions, I don't see how you could possibly be limited on time.

Mr. Renfrew: Well, your Honor, I don't wish to argue with the Court but, if I am given ten days to get these depositions in and a further ten days to get my argument in, I can't do it. That is the point that I am making to your Honor. I will not have time within twenty days to get those depositions out, get the returns back here, and in ten days thereafter submit my argument in writing.

The Court: Well, am I to understand then that you would prefer to make an oral argument this afternoon?

Mr. Renfrew: I wouldn't prefer it, your Honor, but I would rather make it in writing to the Court, but I will [335] have to have additional time, but I will stay here and argue it this afternoon if the Court would rather have it done that way.

The Court: Well, from what you say, it is obvious that you would want about, what, thirty days?

Mr. Renfrew: I would like to have at least

thirty days, your Honor, to submit my argument in.

The Court: Is there any objection to that?

Mr. Boochever: No, I have none because I don't think we can get our depositions all answered and everything else in much less than thirty days, and that is satisfactory with me to submit the argument within thirty days of the termination of the case.

Mr. Renfrew: No. Within thirty days from the date we have the depositions.

Mr. Boochever: With one exception on that, if we will make a further agreement that the depositions be submitted between ourselves within ten days after the completion of the case, so we can start the thing in operation and so there is no undue delay. It is possible that one of the depositions may not be forthcoming or something like that. I don't want to be stalled on this thing indefinitely.

Mr. Renfrew: You haven't been stalled——

Mr. Boochever: I know that.

Mr. Renfrew: Any agreement that Mr. Manders cares [336] to make with me on the time of those depositions will be satisfactory. I assume that he will prepare the depositions here because I will be here.

Mr. Boochever: We haven't decided that yet. I don't know.

Mr. Renfrew: I mean, I will agree with Mr. Manders that the depositions will be gotten out just as quickly as he and I agree on it if he is going to do the work. Probably ten days would be satisfactory with me.

The Court: Well, now, of course since the plaintiff has the opening and closing argument, it seems to me that the time you mention, thirty days, would practically elapse before you would be in receipt of plaintiffs' argument and brief, but the difficulty is that you want at least thirty days after the depositions are on file.

Mr. Renfrew: Counsel has agreed to that provided that we have the depositions out within the ten-day period; that is, we prepare them within the ten-day period.

The Court: Well, if there is no objection, why we can dispose of it in that manner then.

Mr. Boochever: I am sorry, your Honor—what is the manner now?

The Court: Well, you just heard him say that you have no objection to him having thirty days after the depositions are issued provided it is within ten days. [337]

Mr. Renfrew: Provided that the depositions are prepared and on their way within ten days.

Mr. Boochever: That is satisfactory.

Mr. Renfrew: When I say "prepared," I mean that we send them out.

Mr. Boochever: That is right. That is fine.

The Court: Well, do you want to submit, for instance, the written argument independently of each others' briefs, or do you want to have it understood now that you are bound to follow the rule or the procedure that would prevail of course if the matter were disposed of here this afternoon; the plaintiff makes his opening argument and then the

defendant and then the plaintiff his closing argument?

Mr. Renfrew: That would be my understanding, your Honor, and I feel that I will even go so far as to say that, if I have thirty days from the time of service of his argument upon me, if service is this afternoon, I will get it out.

The Court: Well, very well then. That will be the order of the Court.

Mr. Boochever: Do you wish us to proceed now with the rebuttal testimony?

The Court: If it won't take too long beyond noon.

Mr. Boochever: Well, beyond one, you mean?

The Court: No. Beyond noon. If you think it is going to take any considerable time beyond twelve, why—— [338]

Mr. Boochever: Well, it is after twelve now, your Honor.

The Court: Well, that time is a little fast.

Mr. Boochever: Well, I anticipate that my questions will take a very brief time, and I think it will probably take five minutes with Mr. Blanchard and maybe five or ten at the most with Mr. Owens.

Mr. Renfrew: Let's try it, your Honor, and see.

Mr. Boochever: We can cut it off any time, your Honor.

The Court: Very well.

Plaintiffs' Rebuttal

MEL BLANCHARD,

called as a witness on behalf of the plaintiffs, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. Mr. Blanchard, you testified before about your being present and supervising the repairs of this vessel; is that right? A. Yes.

Q. Now, where was the vessel when you first came down there?

A. At the Stikine Fish Company Dock.

Q. And approximately how long was it there, do you know?

A. In the vicinity of one month. [339]

Q. Now, where was it after that, Mr. Blanchard? Where did you take it after that?

A. To the Ballard Shipyard.

Q. And how was it taken to the Ballard Shipyard? A. It was taken under tow.

Q. And did you strike anything—were you on the vessel when it was taken under tow?

A. Yes.

Q. Did it strike anything or hit anything in that trip? A. No.

Mr. Renfrew: Your Honor, I think this is improper rebuttal. What is the nature of this testimony now? Whether it struck anything going across there? This should have been put on in his case in chief. Your Honor, what is he rebutting?

(Testimony of Mel Blanchard.)

Mr. Boochever: What I am rebutting is they have tried to imply that this extensive damage to the bow of the vessel didn't occur when they had it. I assume that is what they have been attempting to do by inference at least, and I am trying to show that that was when it hit the rock and when the damage was done and that was the only time it could have been done; rebuttal to their testimony.

Mr. Renfrew: I don't remember any such inference. Maybe there was.

The Court: Well, I thought there was nothing in the evidence to indicate the possibility of any further [340] damage after the——

Mr. Boochever: I just wanted to obviate any possibility.

The Court: I don't think it is necessary to exclude every possibility.

Mr. Boochever: That was the only purpose of that question, your Honor.

Q. Now, Mr. Blanchard, have you had a previous experience with Diesel engines?

A. Yes. Not that size, but I have had previous experience; yes.

Mr. Renfrew: We object to this, your Honor, as improper rebuttal. The man was asked on direct examination and on cross-examination about his experience and then on redirect again and on recross.

The Court: Well, then you mean it is repetitious?

Mr. Renfrew: Certainly. It is improper rebuttal.

The Court: Well, it would be repetitious but, unless it is preliminary and it would seem to be pre-

(Testimony of Mel Blanchard.)

liminary, however, it is unnecessary since his qualifications already appear.

Mr. Boochever: Your Honor, my recollection is that I admitted asking him that, that counsel asked him about his experience with boats but he did not cover his experience with Diesel engines. That is what I had in mind. [341]

The Court: Very well. Objection overruled.

Q. How long did you work on Diesel engines approximately?

A. I would say approximately four or five years; not all the time, you understand, just off and on.

Mr. Boochever: That is all.

Mr. Renfrew: No questions. Wait just a minute.

Cross-Examination

By Mr. Renfrew:

Q. When you say that the vessel was tied up to the Stikine Fish Company Dock for approximately one month before it was taken over to the shipyard, you are just guessing, aren't you?

A. That is right.

Q. And you don't know the date it was taken over or the date it was brought back, do you?

A. No, I don't.

Mr. Renfrew: That is all.

Mr. Boochever: That is all.

ALMON E. OWENS

called as a witness on behalf of the plaintiffs, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. Mr. Owens, did you hear the testimony yesterday of Mr. Oaksmith in regard to a conversation with you approximately [342] at the P. A. A. office in Seattle? A. I did.

Q. Do you recall now whether or not you had a conversation with Mr. Oaksmith at that place?

A. I believe so.

Q. Did you remember that prior to Mr. Oaksmith's testimony? A. I did not.

Q. Now, do you recall whether Mr. Oaksmith said anything to you, independent of his testimony, about the crankshaft of the vessel?

A. I don't recall the conversation.

Q. Do you remember a man named Dawe who was supposedly with Mr. Oaksmith?

A. I don't remember him at all.

Q. And you have no recollection of a man by that name—Dawe? A. No, I don't.

Q. Does that mean you did not see him?

A. I wouldn't say I didn't see him. I don't remember.

Q. Now, when was the first time that you saw the logbook of the vessel?

A. I don't remember the date. Sometime when I was down there during the summer Mr. Blanchard brought it to my attention.

(Testimony of Almon E. Owens.)

Q. You did not discover that yourself?

A. No, sir.

Q. He showed it to you? [343]

A. That is right.

Q. Now, when you were—going back—when you were having your conversations with Mr. Anderson, you heard Mr. Saindon testify that he overheard a portion of that conversation while you were in the engine room. Do you recall Mr. Saindon being there?

A. I don't recall his being there at all.

Q. Could he have been there?

A. That is possible.

Q. Now, Mr. Anderson stated that you agreed to take the vessel as is where is. Was that ever said to you? A. No, sir.

Q. Any such agreement reached?

A. No, sir.

Q. What was the agreement, as you recall it, from what was said between you and Mr. Anderson, Junior and Senior, in regard to the purchase price and how it was to be paid?

Mr. Renfrew: I object to this as repetition. He has stated it at least two or three times previously.

The Court: I think that it is repetitious.

Mr. Boochever: All right. That is all.

Cross-Examination

By Mr. Renfrew:

Q. Now, Mr. Owens, did I understand you to

(Testimony of Almon E. Owens.)

just state that [344] Mr. Blanchard showed you the logbook? A. That is right.

Q. And then you didn't find it hidden in a locker down underneath the vessel?

A. I never said that.

Q. You don't recall testifying that you found it not where it should have been with the maps but down underneath in a locker below?

A. I didn't say I found it.

Q. And Mr. Blanchard showed it to you in the normal course of events? A. That is correct.

Q. And you say that you now recall your conversation with Mr Oaksmith in Seattle at the time that he told you the crankshaft was flat?

A. I remember meeting him, but I don't remember the conversation.

Q. Well, you just recall now that you did see him there, but you have no knowledge as to what the conversation was about at all?

A. That is right.

Q. You don't have any recollection of he and Mr. Dawe trying to interest you in some other tugboat? A. I don't remember that.

Q. And you have no recollection of getting a room at the New [345] Washington Hotel for Mr. Dawe and discussing with him the purchase of a boat? A. I do not.

Q. Well, now that you remember that conversation, do you remember the further conversation with Mr. Oaksmith, in accordance with his testimony, which took place out at the Fish Company Dock where you had the vessel tied up?

(Testimony of Almon E. Owens.)

A. I do not

Q. You don't recall any conversation there with him in which he asked you why you purchased the boat knowing the crankshaft was probably flat after he had told you so and which he stated to you and you replied, "I purchased it because I could get those terms and I couldn't afford to buy other places because I didn't have the cash?

A. That is not correct.

Q. And would you say it is correct——

A. I never made any such statement.

Q. And you don't remember any such conversation? A. I never made any such statement.

Q. And you don't remember any such conversation——

Mr. Boochever: I object to that. He has answered that question. He stated he never made any such statement.

Q. Do you remember any such conversation with Mr Oaksmith at all?

Mr. Boochever: Well, I would like a ruling on that. [346] Definitely, your Honor, I think it has been answered.

The Court: Well, in view of his answers, the objection is overruled.

Q. You may answer.

A. Will you repeat the question?

Q. Do you remember any such conversation?

A. I wouldn't remember it; no, sir.

The Court: Well, what is it that enables you to recall now that you saw Oaksmith there?

(Testimony of Almon E. Owens.)

A. I remember meeting him up in front of the Pan America Office because his brother took me up to him and introduced me to him. What the conversation was that took place there, I do not remember at this time.

The Court: Well, the only reason you remember the incident is because his brother took you out of the office to the sidewalk there?

A. After he gave his testimony yesterday, that brought it to my attention.

The Court: That is all.

Q. Now, you remember his brother taking you out of the office?

A. I don't remember why I was up there. I was up there——

Q. No; no. I didn't ask you that, sir. That is not in response to my question. I asked you, now do you remember Mr. Oaksmith's brother taking you out of the Pan American Office and introduced you to Mr. Oaksmith? [347]

A. I believe that is right; yes, sir.

Q. And then do you recall getting in the car with Mr. Oaksmith and another gentleman and going up to the New Washington Hotel?

A. That is possible; yes, sir.

Q. And do you recall having any conversation with them in the presence of Mr. Oaksmith?

A. We doubtless did have, but I don't remember what.

Q. And do you recall going up to the New Washington Hotel with them?

(Testimony of Almon E. Owens.)

A. I was staying at the New Washington Hotel.

Q. I believe I knew that you were, but do you recall going up there with Mr. Dawe in the car and Mr. Oaksmith?

A. I don't remember that.

Q. You don't recall that?

A. No, sir; I don't remember it.

Mr. Renfrew: That is all.

Redirect Examination

By Mr. Boochever:

Q. Did you know Mr. Oaksmith's brother before? A. I met him in Ketchikan; yes, sir.

Mr. Boochever: That is all.

Mr. Renfrew: That is all.

Mr. Boochever: We rest, your Honor, except for the [348] depositions.

Mr. Renfrew: So we will have a clear understanding, your Honor, there has been some discussion concerning depositions here; and I think that you wish to take the deposition of Mr. Mills?

Mr. Boochever: And Mr. Dent.

Mr. Renfrew: Both Mr. Mills and Mr. Dent?

Mr. Boochever: That is right.

Mr. Renfrew: And I wish to take the deposition, your Honor, of Mr. Dawe, of Mr. Oaksmith, and also of someone in the shipyards there with regard to the estimate of the repair of this engine. Your Honor will recall yesterday you stopped me asking direct questions on that when counsel objected to it as hearsay, and I said it was all right, I wouldn't

(Testimony of Almon E. Owens.)

proceed further, with the understanding that I could take the deposition. So, there will be three depositions at least, your Honor, that I will have.

Mr. Boochever: I don't recall anything about the one of Mr. Oaksmith, Mr. Renfrew. Was that brought up before, or is this the first time you are mentioning it now?

Mr. Renfrew: I believe that I stated that I wished to take the deposition of the men that were present in the car when the conversation of Mr. Oaksmith, who testified here, testified to with regard to advising Mr. Owens of the flat crankshaft, and that it was Mr. Dawe and Mr. Oaksmith. [349]

Mr. Boochever: I have no objection. I didn't recall it before.

The Court: Well, since you are going to take some depositions, or even one, there would be no particular objection to taking more, so that it may be understood then that the understanding is then that the plaintiff takes two more depositions and the defendant three.

Mr. Boochever: Your Honor, I would like to add one more, too; the Fairbanks-Morse repairman in Seattle.

The Court: Very well.

Mr. Renfrew: I have no objection. In fact, if I have any more, I will let counsel know.

The Court: Well, the only reason for agreeing on the number now, which of course wouldn't necessarily be binding, is so that you both would be apprised of the fact that all the evidence is in when

that number of depositions are presented.

Mr. Renfrew: Before you adjourn, you Honor; I may want a transcript of this testimony, and I would like to inquire of the reporter if it is possible, if I should decide to order a transcript of the evidence, if she would have time to get it out by the end of the month.

Court Reporter: I am afraid it would take longer than that where we have a term of court, and I have some other orders. I would do [350] my best.

Mr. Renfrew: That might be important, your Honor, in my argument.

The Court: Yes, I can see where it would be important. But we start in Juneau on the trial of cases on the 15th and there is a term of court set at Ketchikan for the 26th.

Mr. Renfrew: I realize the handicap we are all working under, your Honor, but, since this matter has been in litigation for a considerable period of time, I would ask counsel to stipulate with me that, if within a few days, within three or four days, if I decide that I need a transcript of this testimony, that it be stipulated that I have until the reporter can get the transcript out before I have to make my reply to your argument and that I will by the same token split the cost of the transcript with you if you desire a copy.

Mr. Boochever: That is satisfactory.

The Court: Very well. Then everything is harmonious, at least for the moment.

(End of Record.) [351]

United States of America
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz. No. A-5226 of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 351, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause, with the exceptions of the depositions submitted and which are of record in the official file of the above-entitled cause.

Witness my signature this 13th day of August, 1951.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Endorsed: Filed August 16, 1951.

[Title of District Court and Cause.]

DEPOSITION OF ORVILLE H. MILLS, A WITNESS CALLED ON BEHALF OF THE PLAINTIFFS.

Pursuant to stipulation for taking depositions, hereto annexed, on this 12th day of April, 1951, at the hour of 11:00 o'clock a.m., the deposition

of Orville H. Mills, a witness called on behalf of the Plaintiffs in the above-entitled and numbered cause, was taken at 656 Central Building, Seattle, Washington, before E. E. Lescher, a Notary Public in and for the State of Washington, residing at Seattle.

Appearances:

The Plaintiffs appearing by
ROBERT L. FLETCHER, of
CHADWICK, CHADWICK & MILLS,
Appearing as attorney and counsel for the Plaintiffs.

The Defendants appearing by
WALLACE AIKEN, of
EMORY & HOWE,
Attorney and Counsel for the Defendants.

(Thereupon the following proceedings were had and testimony given, to wit):

Mr. Fletcher: Let the record show that this is the deposition of Orville H. Mills, taken as a witness on behalf of Plaintiffs, pursuant to stipulation, and that all objections are reserved until the time of trial except as to the form of the question and the responsiveness of the answer. Is that agreeable, Mr. Aiken?

Mr. Aiken: Yes.

Mr. Fletcher: And that the signature of the witness to his deposition is waived?

Mr. Aiken: Yes.

ORVILLE H. MILLS

called as a witness on behalf of the Plaintiffs, being first duly sworn by the Notary Public, was examined and testified as follows:

Direct Examination

By Mr. Fletcher:

Q. Will you please state your name?

A. Orville H. Mills.

Q. And your age, Mr. Mills? A. 43.

Q. And your address?

A. 656 Central Building, Seattle, Washington.

Q. What is your profession?

A. Attorney at law with the firm of Chadwick, Chadwick & Mills.

Q. How long have you been engaged in that profession? A. 22 years.

Q. Are you acquainted with A. E. Owens and his brother, R. F. Owens? A. Yes, sir.

Q. How long have you known them?

A. About 15 years.

Q. And under what circumstances?

A. We have represented them in the office on various matters over the period of fifteen or sixteen years.

Q. Are you acquainted with Jack C. Anderson, Sr., and Jack C. Anderson, Jr.?

A. Yes, I am.

Q. What is the extent of your acquaintance with them?

A. I met Jack C. Anderson, Sr., on April 1, 1947.

(Deposition of Orville H. Mills.)

and I met his son, I believe it was, the following day. I met one or the other of them on several occasions between that period and about May 21, 1947.

Q. Were these meetings all in your office?

A. All of the meetings were in the office here.

Q. Will you state the circumstances of your first meeting with Jack C. Anderson, Sr.?

A. Mr. A. E. Owens brought Mr. Jack Anderson, Sr., into my office on April 1, 1947, and introduced him upon that occasion, which was the first occasion of my meeting with him.

Q. And would you state the substance of what took place at that meeting?

A. Mr. Owens, after introducing Mr. Anderson, outlined that Mr. Anderson had an Army Tug passenger ship for sale; that Mr. Anderson had shown the vessel to Mr. Owens; that Mr. Owens was in the market looking for a tug in connection with his logging operations out at Ketchikan, Alaska, for particular duty in connection with towing rafts of logs from his logging operations in the waters of Alaska to mills, I believe, around Juneau, and that in that connection he had looked at Mr. Anderson's vessel.

Q. Did Mr. Owens state the purchase price of the vessel?

A. He stated that the vessel was for sale at the price of $25,000, five thousand dollars down, two thousand dollars a month with 8 per cent interest on deferred balances.

(Deposition of Orville H. Mills.)

Q. And in what connection had Mr. Owens come to see you about the vessel?

A. There were some questions as to the condition of title and as to prior encumbrances upon the vessel, and he had stated that he had come for the purpose of advice in connection with consideration of a preliminary agreement covering the purchase. And——

Q. (Interposing): And did you make—well, go ahead.

A. I inquired of Mr. Jack Anderson, Sr., and through him was advised that he and his son, Jack Anderson, Jr., operated the Anderson & Son Transportation Company in Alaska; that they had purchased an Army tug, I think it was TP-100, from War Surplus; that they had used it for but a short time; had brought it down from Alaska, and that they had it for sale.

He stated that they had not as yet received the bill of sale covering the vessel, and had some concern as to being able to secure the bill of sale; that the vessel was not documented; he had some question as to the documentation of the vessel; that the vessel was covered by a mortgage to the First National Bank of Anchorage—I believe it was a thirty thousand dollar mortgage covering this vessel, and other property and that there would be a problem on the sale of this vessel and securing the release of this vessel from under that mortgage.

He had had some preliminary correspondence with the bank and, as I recall, had a telegram from

(Deposition of Orville H. Mills.)

the bank in which they authorized him to sell at the price indicated and to, upon selling, assigning the down payment and the note and mortgage for the purchase price to the bank, and the bank would then release the prior mortgage that covered this vessel and other property.

Both Mr. Anderson and Mr. Owens posed the question as to how a present agreement could be drafted in that connection, and Mr. Anderson then expressed his desire that some present agreement be drafted as against the necessity of awaiting the procuring of a bill of sale, documentation and release of the prior mortgage, and then entering into an agreement.

Q. Why was he anxious to do that presently?

A. He expressed the statement that he had a sale of the vessel being negotiated to an individual or a group of individuals in Vancouver, B. C.; that they had thoroughly examined and inspected the vessel, and were prepared to go ahead at that price, and that he was awaiting word from them upon a sale of the vessel; and while he was in the office that day, he received a telephone call which was taken within the office here, and on turning away from the 'phone, he informed Mr. Owens that that was a call in connection with the sale of the vessel to the individual or the group in Vancouver, and that they were anxious to complete it, and if Mr. Owens wanted to take the vessel, that they would have to go ahead and get a firm commitment on it at that time.

(Deposition of Orville H. Mills.)

Q. Did Mr. Owens state whether he was willing to proceed on the basis that was outlined then?

A. Mr. Owens indicated that he was ready to proceed to purchase the vessel if the vessel was as indicated and represented by Mr. Anderson.

I inquired of Mr. Owens whether he had fully inspected the vessel, or had had any competent marine engineers inspect it. He informed me that he had not, and he engaged in some side conversation with Mr. Anderson with reference to the vessel, the only portion of which I noted being an assurance by Mr. Anderson that the vessel was as represented, and that they could proceed to close the transaction at that time.

Q. Did Mr. Anderson make any reference to any inspections that might have been made previously?

A. Yes. He had in the course of that conversation referred to the fact that the group in Canada, or the individual in Canada had made a full inspection of the vessel, and that it was as Mr. Anderson had represented it to Mr. Owens.

Q. And in view of that, what did you proceed to do?

A. They were desirous of getting some preliminary agreement drafted that would bind the parties. I dictated an agreement while Mr. Anderson and Mr. Owens were present. In the course of that, a problem was suggested in that Mr. Anderson was going back to Alaska, and Mr. Owens, to make some repairs on the scored crankpin, as I understand it, was to take possession as of the time of

(Deposition of Orville H. Mills.)

the preliminary agreement, and there was some discussion as to a clause which would make the purchaser responsible for the vessel at the place where it was then located—at Olson & Winge's—in view of the fact that he was going to move it to the Stikine Fish Company's dock for the purpose of making a repair on the scored crankpin. And we inserted a clause in the contract to assume responsibility for the vessel as of the date that the preliminary agreement was executed, at the Olson & Winge dock.

I think that there was also some discussion as to full insurance coverage on the vessel.

Q. Was the agreement drawn up in their presence on that day?

A. The agreement was dictated in their presence, and was prepared later.

Q. Did anything further take place at that meeting on that day?

A. I think that was the substance of the meeting on that day.

Q. Did you have any subsequent meeting then with these two people?

A. The following day, on April 2nd, Mr. Jack Anderson, Sr., and Mr. Jack Anderson, Jr., and Mr. Owens came in and went over the agreement which I had prepared, and the agreement was executed by them on that date, and provision had been made for acceptance of the agreement by the First National Bank of Anchorage of their mortgage and the requirement that upon the closing

(Deposition of Orville H. Mills.)

of the transaction that mortgage be released. And at their request, I forwarded the agreement on up to the First National Bank of Anchorage for the execution of it and consent by them, and I think that I also addressed some correspondence to the original builder of the vessel in connection with procuring the carpenter certificate for documentation, and made some inquiries from Mr. Landweer in connection with documentation.

Q. When you spoke of forwarding this to the bank at Anchorage, you said that it was at their request. You mean at the request of Mr. Anderson and Mr. Owens?

A. It was at their mutual request, yes.

Q. Did anything else take place at that meeting of April 2nd?

A. That is the substance of the meeting, according to my present recollection.

Q. Did you have any subsequent meeting with Mr. Anderson or Mr. Owens?

A. I think that Mr. Owens went back to Alaska about that time. Mr. Anderson was in the office on April 4th; April 7th, and possibly some other dates along that time, in connection with the advice that he had procured the bill of sale, and in connection with matters pertaining to documentation, and then they were all here as of April 22, and I mean, by "all," Mr. Anderson, Sr., Mr. Anderson, Jr., and Mr. A. E. Owens, on April 22nd, when the payment of five thousand dollars was made, the note and mortgage executed, and assignment of the note

(Deposition of Orville H. Mills.)

and mortgage and endorsement of the check to the First National Bank of Anchorage executed, and the bill of sale delivered and the documents forwarded.

Q. And you say that was on April 22nd that that took place?

A. April 22nd, I believe.

Q. Did you have any subsequent transactions with either of the two Mr. Andersons?

A. Yes.

Q. What was the nature of those transactions?

A. Well, Mr. Anderson, Jr., and Mr. Anderson, Sr., came into my office on May 21, 1947, in response to a letter which I had addressed to them on behalf of Mr. Owens, in connection with a claim for misrepresentations made in connection with the sale of the vessel. The letter had been addressed to Mr. Anderson, Jr., in Seattle, and Mr. Anderson, Sr., in care of the Bank at Anchorage, but apparently he had been in Seattle, as they both came into my office within four days after the letter was mailed.

Q. You mean that it was a duplicate letter?

A. Yes.

Q. And one went to each of the two men?

A. Yes.

Q. Do you recall the date on which you sent the letter?

A. The letter was a letter of March 17, 1947.

Q. Are you sure that it was March?

A. May 17, 1947.

(Deposition of Orville H. Mills.)

Q. When they then came into your office on May 21, what occurred then?

A. They came in response to a letter which I had written on behalf of Mr. Owens. We discussed the matter of what representation had been made. Mr. Anderson, Sr., admitted having represented that one crankpin had been scored on the vessel; that there had been some damage to the forefoot of the vessel, and that the vessel was not leaking. And he took the position, as I recall——

Mr. Aiken (Interposing): I object now as to what position he took.

Q. (By Mr. Fletcher): Were these statements made by Mr. Anderson at the time of that meeting in your office?

A. Yes. This was all a matter of discussion between Mr. Anderson, Sr., largely speaking for the parties who came in, and myself.

Q. He made these statements then to you, and in your presence? A. That is correct.

Q. And would you state what he said to you about that?

A. He stated that on bringing the TP-100 down from Alaska, they had struck a log on the way down, and that the forefoot of the vessel had been bruised as the result of striking that log.

Q. Did he say anything with reference to the weather conditions at the time they struck the log?

A. He said that the weather had been foul

(Deposition of Orville H. Mills.)

and the water rough, and they had struck the log in the course of that trip.

Q. Was there any statement made of the possibility of what they struck having been anything else?

A. I confronted him with what at that time we had evidence of, and that was the fact that the vessel had grounded upon a rock and struck a rock in the channel on the way down. He emphatically denied that they had struck a rock, or any object which could occasion extensive damage to the forefoot or to the keel of the vessel.

Q. Did either of them state what they had told Mr. Owens as to the amount necessary to repair the vessel?

A. At that time, they stated that they had told him that there was——

Mr. Aiken (Interposing): I will object to "they." He should state which individual said what.

The Witness: My best recollection is that Mr. Anderson, Sr., was the one who was making the statements; that Mr. Anderson, Sr., stated that he had told Mr. Owens that there was a scored crankshaft, that the forefoot had been bruised, and that it would take five thousand dollars for the purpose of making repairs to the vessel.

Q. In connection with the bruised forefoot, did he state what the nature of the repair would be?

A. No, he did not go into the extent of the nature of the repair.

(Deposition of Orville H. Mills.)

Q. Did they make any statements concerning the previous use of the vessel during the time that they had owned it?

A. In connection with the claim made by Mr. Owens that the keel had been damaged, Mr. Anderson, Sr., did state that the TP-100 had been used by them for some transportation in Alaska, which involved some river transportation, and that it had too deep a draft for the shallow river bars, and that it had been scraped or dragged at times on river bars, giving that as an explanation of possible damage to the keel.

He referred to it lightly, merely as the normal and usual scraping of a vessel on a river bar.

Q. In connection with the use of the vessel on the rivers in Alaska, did they mention whether such use might have occasioned damage to the forefoot?

A. There was no indication that there had ever been any collision of any kind; it was just the incidental scraping on the bars.

Q. When you stated that Mr. Anderson, Sr., had stated to you that the vessel had run into a log on the way down, did he make any reference as to the effect of that collision with the log on the boat at the time, as to whether they had noticed that they had struck a log?

A. Why, yes. He indicated that they had known that they had struck a log. I think that he put it

(Deposition of Orville H. Mills.)

as having struck the log in rather rough weather on the way down.

Q. Did he mention that the shock was noticeable in the boat?

A. I do not think that that was specifically stated.

Q. At the time of that meeting in your office, was any statement made concerning what their intentions were in the next few days, as to whether they were going to further contact Mr. Owens concerning this matter? A. Yes.

Q. What was that?

A. Mr. Anderson, Sr., stated that he was leaving within the next few days for Alaska with the other vessel that he owned, and that he expected to be up in Alaska and would drop by and would see Mr. Owens on the way up to Alaska for the purpose of discussing this matter, and also for the purpose of returning a lifeboat which he had borrowed from Mr. Owens, according to him, and which he was using for the purpose of this particular trip, I thought, and that the matter of the claim would be considered and discussed with Mr. Owens.

Mr. Aiken: I ask that that be stricken if it is offered for the purpose of showing any efforts at a compromise of the claim.

Q. (By Mr. Fletcher): In connection with the lifeboat, was this a boat which the Andersons had borrowed? Did I understand you correctly on that?

A. All I know as of that time was what Mr. Anderson stated, and that was that he had a life-

(Deposition of Orville H. Mills.)

boat which belonged to Mr. Owens which he was going to return on the occasion of calling on Mr. Owens at that time.

Q. Did you have any subsequent dealings with either Mr. Anderson, Sr., or Mr. Anderson, Jr.?

A. The extent of any subsequent dealings was the sending to them of the demand of July 24, 1947, which I believe is in evidence, which was the detailed statement of the claim of Mr. Owens, and also the demand for the return of the lifeboat, which had not been returned.

Q. Did you have any response to that demand of July 24th?

A. I received no response to that demand.

Q. Have you had any subsequent contact with either of the two Andersons between then and now?

A. I have not seen Mr. Anderson until today.

Mr. Fletcher: You may inquire.

Cross-Examination

By Mr. Aiken:

Q. In your recollection of these events of four years ago, do you have notes from which you have refreshed your recollection?

A. I have a very extensive file here which covers the entire transaction—yes—and I also reviewed my day book in connection with it.

Q. You have answered these questions from a typewritten list here or series of sheets of at least seven or eight sheets, have you not?

(Deposition of Orville H. Mills.)

A. I have not. I have no record or document before me at all.

Q. I mean, the questions have been asked by Mr. Fletcher by reading from seven or eight legal length double spaced typewritten sheets, is that correct? A. That is correct, yes.

Q. And who prepared this list of seven or eight sheets?

A. I prepared that for Mr. Fletcher, who has no knowledge of this matter, and I asked him to come in today for the purpose of conducting this examination.

Q. And the sheets were prepared for the purpose of this hearing?

A. For the purpose of his examination of the witness—yes.

Q. And the information therein contained was from the file which you kept during the course of these negotiations? A. That is correct.

Q. Now, when they first came in, what do your notes indicate with respect to the representations that Mr. Anderson is alleged to have made?

A. I have no notes as to any representations which Mr. Anderson is claimed to have made.

Q. So you do not know what representations he made to Mr. Owens, and at that time, you didn't know of any representations?

A. Perhaps I am confused. You say, when they first came in. You mean April 1, 1947?

Q. Yes.

(Deposition of Orville H. Mills.)

A. No, I do not, as of that date, have any knowledge of the representations.

Q. And that was the date that the agreement was drawn up?

A. That was the date that the agreement was drawn up, yes, sir.

Q. And you were retained by Mr. Owens to draw it? A. That is correct.

Q. And presumably you were paid by Mr. Owens for this service? A. That is correct.

Q. And do you still represent him in various legal matters? A. Yes.

Q. And with reference to that agreement, you say that it was dictated in their presence?

A. That is correct.

Q. Did you use terms in that agreement of warranty as to the condition of the vessel?

A. My recollection is that there was no express term within the agreement.

The agreement I think would speak for itself.

Q. Mr. Anderson in your presence, or at least your notes do not indicate that he made any representations as to the condition of the vessel in your presence on April 1?

A. My notes do not indicate that he made any representations, and the only indication that I have is the matter of the statement, as I have testified, that the vessel was as represented, and he had some side conversation with Mr. Anderson, concerning which——

(Deposition of Orville H. Mills.)

Q. (Interposing): But you do not know what he represented—on April 1, 1947, when you drew the agreement, and prior to the drafting of it you didn't know of your own knowledge what the terms were which consisted of the as represented term which you have used? A. That is correct.

Q. And did Mr. Owens mention to you anything about "as is and where is basis of sale"?

A. The only thing mentioned that in anywise would be comparable to what you have referred to——

Q. (Interposing): I would just like to have you answer that, if you can.

A. No. There was nothing said as to where is, or as is, by either Mr. Owens or Mr. Anderson in connection with drafting the agreement.

Q. What was said when they first came in on April 1st and Mr. Owens introduced Mr. Anderson—I wonder if you could go over that again, just what was said—strictly with respect to the—well, I will strike that last question. Well, with respect to the representations, there were no representations made by Mr. Anderson to Mr. Owens in your presence, is that correct?

A. Yes, there were.

Q. What were the representations?

A. He represented, first, that he had a boat—I mean, if you want me to go into that——

Q. (Interposing): I mean with respect to the condition of the vessel.

(Deposition of Orville H. Mills.)

A. With respect to the condition of the vessel?

Q. Yes.

A. Nothing, except his statement—when I inquired of Mr. Owens as to whether he had had full inspection, and Mr. Anderson was asking him to presently close the deal, what Mr. Anderson stated was that the vessel was as represented. Now, what the representation was, that was the subject of separate conversations between them.

Q. Do you have the notes here of April, 1947?

A. Yes, I have.

Mr. Aiken: I wonder if we could have them marked and identified?

Mr. Fletcher: I would object to introducing the notes themselves. He merely used those to refresh his recollection.

Mr. Aiken: He said that he didn't have any independent recollection.

Mr. Fletcher: No, he didn't say that. He said that he referred to his notes to refresh his recollection, and he has done so. They are not part of the evidence.

The Witness: As a witness, and claiming the privilege of denying that, Counsel, I have never stated that I haven't any independent recollection. I have a very definite independent recollection of it, but, as you or anybody would do, I went back to review all my records in connection with the transaction.

Q. Your notes of April 1, 1947, then, to describe them, consist of a yellow sheet with pencil nota-

(Deposition of Orville H. Mills.)

tions on one side, and a half page of another sheet?

A. The notes as I presently have them with reference to that conference comprise one sheet pertaining to the terms and condition of the sale; one-half sheet pertaining to documentation of the vessel, and another half sheet pertaining to information as to the lack of registration and insurance, and notes as to copies of the various documents.

Q. That is, it contains the names of the parties, and a description of the vessel, and the terms of the sale, is that right?

A. I have no objection to your looking at them (handing notes to counsel).

Q. Do these bear the date of April 1, 1947?

A. They do not.

Q. There is nothing on these notes, is there, as to the use to which Mr. Owens said that he was going to put the tug? A. There is not.

Q. Do you have your notes concerning the visits of April 2nd; April 4th; April 7th and April 22?

A. Those are taken—purely from my day book, of entry as of those times.

Q. And that shows, does it not, merely that Mr. Anderson at a certain time came into your office?

A. April 2nd shows Mr. Anderson and Mr. Owens signed contract; letter Bank, and ship builder.

Q. And those notes were made when?

A. As of that date.

(Deposition of Orville H. Mills.)

Q. You do not have any written notes then with respect to: (1) the use to which the tug was to be placed; (2) the use which the Andersons had made of it; (3) of the call allegedly from the Vancouver parties. That is your recollection as distinguished from your notes?

A. I have a written record of that—yes—but it was not made as of the day of the meeting. It was made as of the date when Mr. Owens made his demand on Mr. Anderson, which was May 17th or thereabouts. Actually, I think that it was a little later than that date—it was a month and a half or so after the conference.

Q. And you, as an attorney, are familiar with the fact that there would be implied warranties with the sale of a vessel as to its condition, are you not?

Mr. Fletcher: I object to that as calling for his conclusion.

A. As an attorney, I am aware of the fact that there are implied warranties in connection with the sale of the vessel.

Q. Did you advise Mr. Anderson that while there might not be terms of warranty in this instrument, nevertheless there were terms of warranty implied by law?

A. I was not advising Mr. Anderson in connection with the agreement. Mr. Anderson, as I understand it, was relying upon the First National Bank of Anchorage and its attorneys to protect him in the matter, and before the sale was consummated,

(Deposition of Orville H. Mills.)

their attorneys came down and went over the whole transaction—Mr. Arnell did.

Q. Mr. Arnell came here to your office?

A. That is correct.

Q. After the instrument of April 1, 1947 had been signed?

A. Yes, after it had been signed by Anderson, but my recollection is that before the transaction was closed with the delivery of the agreement as accepted by the bank, the execution of the agreement was subject to the acceptance of the transaction by the bank.

Q. Did Mr. Arnell state who sent him here?

A. Yes, that the bank sent him here.

Q. And then at the time that you drafted this, Mr. Anderson was not advised of the fact that the instrument as drawn contained implied warranties of the fitness of the vessel?

A. I don't know. He was not advised by me, no.

Q. You did not tell him? A. No.

Q. What did Mr. Owens say about the use to which he intended to put the tug?

A. That he intended to put the tug to the use of towing rafts of logs from his logging operations, primarily in and around Ketchikan and in Alaskan waters, and other heavy towing.

Q. Did you ask Mr. Owens as to the use to which he intended to put the tug, or did he just volunteer that information?

A. That was his statement indicating why he was in the market, and why he was looking for a

(Deposition of Orville H. Mills.)

vessel. That was stated by him as he came in.

Q. You do not recall any statement by Mr. Owens that he was going to use the tug for any purpose of making a trip down South?

A. I believe that the first thing that he was going to do with it was to go down South and pick up a War Surplus barge that he had purchased down there.

Q. He made that statement here as to what he intended to do with respect to the use of it then?

A. My best recollection would be that his preliminary statement, as he introduced the subject of his desire to purchase the tug, was that it was for use in the towing of logs in Alaskan waters; that the matter of picking up the barge was a matter that developed later, and was an incidental use purely because he had purchased this barge down in California.

Q. And this conversation about the river transportation that the vessel had been used in—that did not occur April 1st, as I understand it?

A. No, my recollection is that that was——

Q. (Interposing): That was when the Andersons—father and son—came to your office?

A. That was as of the time of May 21st.

Q. Did he say what river it had been used on?

A. No. It was purely a general statement in explaining the use of the vessel.

Mr. Aiken: I have no further questions.

(Deposition of Orville H. Mills.)

Redirect Examination

By Mr. Fletcher:

Q. As to this trip to the South, did he state what he was going to do with the barge?

A. I cannot say that there was any statement made as to what he was going to do with the barge.

Mr. Fletcher: I have no further questions.

The Witness: The barge was a barge that was purchased Surplus down in California, and the only element of the tug being involved was, and I would not swear that it was even at the conversation of April 1, that the barge was brought in, but I do recall that he did state at some time that he intended to use this tug for the purpose of going down and picking up a barge in California.

Mr. Fletcher: I have no further questions.

Mr. Aiken: I have no further questions.

Mr. Fletcher: Just one thing more. Mr. Mills, do you consent to waiving your signature to your deposition?

Mr. Mills: Yes.

(Deposition concluded.)

Certificate

State of Washington,
County of King—ss.

I Hereby Certify that on the 12th day of April, 1951, at the hour of 11:00 o'clock a.m., before me, E. E. Lescher, a Notary Public in and for the State of Washington, residing at Seattle, Washington, at 656 Central Building, Seattle, King County, Washington, personally appeared, pursuant to stipulation for taking depositions, hereto annexed, Orville H. Mills, a witness called on behalf of the Plaintiffs in the foregoing entitled and numbered cause, for the purpose of giving his deposition pursuant to the provisions of the Rules of Civil Procedure of the District Court of the United States.

Robert L. Fletcher, Esq. (of Messrs. Chadwick, Chadwick & Mills) appearing as attorney and counsel for and on behalf of the Plaintiffs; and

Wallace Aiken, Esq. (of Messrs. Emory & Howe) appearing as attorney and counsel for and on behalf of the Defendants; and

The above-named witness being by me first duly sworn to testify to the truth, the whole truth and nothing but the truth, and being carefully examined, deposed and said as in the foregoing deposition set out.

I Further Certify that the said deposition was taken down by me stenographically and thereafter reduced to typewriting under my personal supervision; that the transcript of the said deposition is

a true and correct transcript of the proceedings and testimony given on the taking of said deposition; and that the said deposition has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court as required by law.

I Further Certify that the signing of the said deposition by the said witness was expressly waived by counsel for the respective parties, and by the witness himself.

I Further Certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause.

Witness My Hand and Official Seal at Seattle, King County, Washington, this 23d day of April, 1951.

[Seal] /s/ E. E. LESCHER,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed April 24, 1951.

[Title of District Court and Cause.]

DEPOSITION OF TED ENGSTROM TAKEN BY THE PLAINTIFFS

Pursuant to stipulation, on this 12th day of April, 1951, at the hour of 3:00 o'clock p.m., at 656 Central Bldg., Seattle, King County, Washington, the deposition of Ted Engstrom, a witness called on behalf of the plaintiffs in the above-entitled and numbered cause of action, was taken before Glen W. Walston, a Notary Public in and for the State of Washington, residing at Vashon.

Appearances:

The plaintiffs appearing by
ORVILLE H. MILLS, ESQ., of
CHADWICK, CHADWICK & MILLS,
Their Attorney and Counsel;

The defendants appearing by
WALLACE AIKEN, ESQ.,
Their Attorney and Counsel.

Thereupon, the following proceedings were had and testimony given, to wit:

Mr. Mills: Let the record show this deposition is being taken pursuant to stipulation, copy of which is attached, of a witness called on behalf of the plaintiff.

TED ENGSTROM

being first duly sworn by the Notary Public, and being carefully examined, testified as follows:

Direct Examination

By Mr. Mills:

Q. Will you state your name, please?

A. Ted Engstrom.

Q. What is your employment?

A. Well, I have got so many titles I don't know which one to tell you. Sometimes I am referred to as field engineer, and at other times as technical supervisor; and at other times as mechanic—whatever the case happens to be.

Q. With what company?

A. Fairbanks-Morse & Co.

Q. How long have you been employed by them?

A. Eleven years.

Q. In general, in what business is Fairbanks-Morse engaged?

A. In the engine business, scale business, pump business, electrical business, and some appliances.

Q. Do they have any volume of business in the repair of marine engines?

A. Well, comparable with the rest of the companies, I imagine.

Q. You have some volume in that business?

A. Yes, sir.

Q. What are your particular duties in connection with that?

(Deposition of Ted Engstrom.)

A. Installation and repair of engines.

Q. Does that include marine engines?

A. Heavy marine—stationary—whatever it happens to be used for.

Q. Were you, in April of 1947, acquainted with an army tug passenger vessel TP 100?

A. Yes, I saw it.

Q. Which was formerly owned by the Andersons and was purchased by the Owens?

A. I couldn't swear to who owned it, but I had heard it was Mr. Anderson's.

Q. How did you become acquainted with the vessel?

A. Well, we were called in by Mr. Owens, over the phone, to check the condition of the engine.

Q. And did you, personally, check the engine?

A. Yes, sir.

Q. In what condition did you find the engine?

A. As far as I was concerned, it was beyond further use.

Q. Can you, just briefly, outline to us just what the actual condition of the engine was?

A. Well, the actual condition, as I found it—to begin with, the No. 5 piston was tied up with a cable through the outer inspection door of the crankcase; the crankpins, that is what the bearings set on, was scored and burned beyond further use.

Q. Now, that is one crankpin?

A. Yes, the No. 5. That is what I am speaking of now.

(Deposition of Ted Engstrom.)

Q. All right. Go ahead.

A. Now, we will start out. All main bearings were either completely wiped out, or the babbitt was cracked, with pieces missing.

Q. What else did you find?

A. All main bearing journals scored, and approximately one-eighth inch under the original shaft diameter.

Q. Approximately?

A. One-eighth inch under the original shaft diameter. Plugged water pump; drive gear—teeth missing, and gear beyond further use. Water pump shaft—that is salt and fresh water pump shafts—bent, and bearings beyond further use. That takes care of about all of it.

Q. What was the condition of the crankshaft as to being twisted or warped?

A. In the position of the No. 5 bearing, in relation to the crank webs, the shaft was distorted 3/64ths of one inch.

Q. A layman would probably refer to that as being warped or twisted? A. Yes, sir.

Q. What was the condition of the oil columns used in the lubrication of the engine?

A. I haven't got down into the base there yet. The oil columns through the main bearing webs were packed solid with babbit, the full length.

Q. Did that clog the oil columns?

A. That is right. It caused total restriction.

Q. Was there any temporary——

A. Temporary tubing?

(Deposition of Ted Engstrom.)

Q. Temporary system?

A. Yes, a temporary system had been installed by tapping the lower oil header and running a tube to the bottom of the main bearing bosses. There was a little complaint of the bottom header, running fore and aft the length of the engine, was stopped up with babbit at various places. I might also add that the lower base of the engine, due to intensive heat, had warped considerably.

Q. That was the base of the engine? The base of the engine itself was warped?

A. The lower base, or what we think of as the crankcase, and its component parts.

Q. You say that would be the result of heat?

A. Yes, sir.

Q. What would that indicate to you?

A. That would indicate to me that sometime or other, the engine had run totally out of oil, letting the shaft down and giving a metal-to-metal contact between the steel bearing shells and the crankshaft, to the extent that considerable friction was set up, causing a fire in the base.

Q. What would the clogging with the melted babbitt indicate to you?

A. It would indicate to me that when this oil supply to the bearings stopped, the bearings were wiped out. I mean by that, they attained a temperature high enough to melt the babbitt, which ran down into the holes into this oil column where the oil was supposed to come.

Q. Now, to ascertain this condition of the en-

(Deposition of Ted Engstrom.)

gine, was it necessary to tear the engine down completely? A. Absolutely.

Q. How complete an overhaul, or tear-down was that?

A. That was removing the shaft and installing a new one.

Q. How did you remove the shaft?

A. The upper base, cylinder head and manifolds, were lifted off the lower base to a height of about 30 to 32 inches; the shaft was then moved out laterally, or fore and aft, out through the aft end of the base, through a door out into the aft hold, a small piece of hatch coaming taken off, and it was lifted off with a crane.

Q. In your opinion, was that the most efficient method of removing the shaft?

A. That is my idea of it.

Q. Would it be possible to remove the shaft through the stack? A. It is possible.

Q. How would you compare the time and expense consumed in that manner?

A. I would say the time and expense would have been, probably run seven to eight times as great as the other.

Q. It would have been seven or eight times as expensive to remove it through the stack as to use the method in which it was actually taken out?

A. That is right.

Q. In addition to the complete replacement of the shaft, did you make a complete overhaul of the engine itself?

(Deposition of Ted Engstrom.)

A. Yes, the pistons were removed and checked as to the condition of the piston surfaces, wrist pins and bearings. The wrist pin bearings—their condition was good.

Q. You had nothing to do with the tail shaft overhaul or repairs? A. No.

Q. Are you acquainted with the amount of the charge for the service rendered in connection with the overhaul? A. No.

Q. And the statements as submitted for Fairbanks-Morse would speak for themselves on that?

A. Yes, sir.

Q. I have just one more question. In your opinion, was the work performed in the most efficient manner, and with the least expense?

A. Yes, sir.

Q. And was the work which was performed necessary to place the engine in good condition?

A. Yes, sir; it was.

Mr. Mills: You may cross-examine.

Cross-Examination

By Mr. Aiken:

Q. When did you first see this vessel?

A. You mean the date? That I couldn't tell you, unless I went back into the files in the office.

Q. Have you got an approximate date when you first saw it? A. No.

Q. You don't recall the date when you saw the vessel? A. Not right away.

Q. Do you remember where you saw it?

(Deposition of Ted Engstrom.)

A. At the Stikine Fishing Company dock. That is where I originally went to work.

Q. Where is that?

A. At 740 Westlake North.

Q. That is in Lake Union, then?

A. That is the southernmost point of Lake Union—at Westlake and Roy.

Q. Do you know whether or not the vessel got there under its own power?

A. I have no idea.

Mr. Aiken: Off the record for a moment.

(Discussion off the record.)

Q. (By Mr. Aiken): Well, when you went aboard, did it appear to you that the engine had been recently operated?

A. Well, that I couldn't say, either.

Q. It is true, isn't it, that really, all this damage you have mentioned was due to lack of oil, and excessive heat and friction was a result of it?

A. Yes, sir.

Q. In the eleven years you have been with Fairbanks-Morse, your time, or a good proportion of it, has been devoted to Fairbanks-Morse engines; isn't that true? A. Yes.

Q. Of this particular type? A. Yes, sir.

Q. In your past experience, have you ever seen an engine suffer from the same type of damage?

A. Yes, sir.

Q. Would this be because of the complete lack of oil? A. Yes, sir.

(Deposition of Ted Engstrom.)

Q. If an engine had complete lack of oil, how long would it need to run to generate sufficient heat to cause all this destruction?

A. That is hard to say. There is oil that gets there—if there is a total lack of oil in the base, that doesn't totally starve the bearings, because there is oil from some other sources, such as off the pistons, or the drain ring at the bottom of the cylinder that does drop some oil on the shaft.

Q. Well, with oil from this source dropping on the crank, how long could an engine of this type operate before this damage would be caused?

A. I might state here again, that at the time this engine was opened up, it wasn't totally dry of oil. The fact that these various tubes had been put into use, besides these stopped-up passages, so that the shaft did have some oil. In other words, an engine of that make, if the oil were totally taken away from it, it would turn into complete seizure in two hours.

Q. In the condition it was in, could it operate?

A. It could run.

Q. How long could it run?

A. From the condition I found, if it was actually being run—I mean, not at full R.P.M.—full load—it would probably run 24 to 36 hours.

Q. Did you speak to Mr. Owens at all?

A. You mean, at that time?

Q. Yes. A. Yes.

Q. Did he tell you what use he had made of the tug?

(Deposition of Ted Engstrom.)

A. As far as I know, he hadn't made any use of it up to that time.

Q. Did he tell you how long he had owned it?

A. No.

Mr. Aiken: Off the record.

(Discussion off the record.)

Q. (By Mr. Aiken): What portion of this damage you have referred to was visible when you examined the engine, without having torn anything down?

A. Well, the only thing visible was No. 5 crankpin.

Q. Was there anything you observed that led you to believe, before it was torn down, that you would find this damage? A. Yes.

Q. What did you observe?

A. Small pieces of babbitt in the base.

Q. Describe to me what the base is.

A. That is the bottom of the engine—the crankcase.

Q. That is visible from just standing there and looking?

A. Well, the door was off this No. 5. So I looked at the pin—you could look into the base, and I saw these little pieces of babbitt.

Q. And that would indicate?

A. That babbitt had to come from some place, so then I started looking.

Q. What else, from your examination, did you

(Deposition of Ted Engstrom.)

observe was injured before you started to remove the base of the engine?

A. I noticed the shells of the bearings had the edges turned out.

Q. What did that mean to you?

A. Extra hard metal-to-metal contact had taken place.

Q. What else did you observe?

A. I observed the clearance between the shaft and the upper half of the bearing was unreasonable. Where we allow on the shaft .004, that shaft had 3/32nds of an inch clearance.

Q. That was visible? A. Yes, sir.

Q. What else was visible?

A. The general appearance of the base. The paint on the base, particularly in the region of the main bearings bosses, which retain the main bearing shells, was showing discoloration of the paint, or charring of the pigment in the paint, indicating intense heat had been there.

Q. What else was visible to indicate there had been intense heat?

A. That is all, from the standpoint of just looking, without opening anything up.

Q. These visible defects of the pieces of babbitt and of the charred paint which you observed, indicated there would be internal damage?

A. That is right.

Q. You are sure this was No. 5 and not No. 3?

A. It was No. 5.

Q. If that engine had been started, would it

(Deposition of Ted Engstrom.)

have made a noise or something else that would show that there was something wrong?

A. Not necessarily.

Q. Why do you say "Not necessarily"?

A. It was a two-cycle engine and all pressures are down.

Q. You mean that engine could be started and operated, and if a person didn't examine it from the outside—say, he stood away in the cabin—would there be a burning-oil smell, for instance?

A. Possibly, but very slight.

Q. What I am getting at: If that engine had been turned over in operating, could you hear any noise, would there be any smell or vibration, or something else that would immediately draw your attention to the fact there were possibilities of internal damage?

A. If you are speaking of noise, that particular engine of that type—the bearings would have to have an unreasonable clearance before you would hear any noise; and particularly the crankshaft bearings. That wouldn't apply so much to the main bearings. Smells are hard to ascertain, because the crankcase is closed.

Q. But in the condition in which this engine was, wasn't there any damage to the crankcase which would have permitted fumes to come into the engine room?

A. There would be some, but unless you were looking for it——

(Deposition of Ted Engstrom.)

Q. But a rough inspection by you, as an expert, showed there was internal injuries?

A. Yes, sir.

Q. My question is: Would a reasonable operation of the engine disclose defects of some kind? I mean, a trial run?

A. You mean, as to noise or smell?

Q. Yes.

A. Some noise—not too much to speak of.

Q. Not to a layman, but to you, as a practicing engineer? Would there be tappet noise?

A. There is no tappets on this.

Q. I realize that, but there would be some kind of noise?

A. There would be a heavier noise—a thud.

Q. That wouldn't exist in an engine in good condition? A. That is right.

Q. So that there would be some strange noises? To a layman?

A. There might be detonating noises in the cylinder itself, which sometimes are thought to be in the base—in the crankshaft or the bearings.

Q. Did you observe the condition of the vessel, other than around the engine? A. I did.

Q. What did you observe?

A. Well, I was standing on the dock there one day and I happened to be looking down at the waterline, and saw quite a sliver of wood—about a foot under water—on the forefoot.

Q. That is, you viewed that while standing alongside the vessel? A. Yes.

(Deposition of Ted Engstrom.)

Q. What did that indicate to you, or did it indicate anything?

A. I talked to Mr. Owens' representative, who was aboard at the time, and told him there might be some damage. He didn't think so, and I told him he had better get a skiff and look down there, as from what was visible there seemed to be some damage to the forefoot.

Q. How much damage? In viewing it from the dock, there appeared to be some damage?

A. It appeared so.

Q. What else did you observe?

A. That is all, except what I seen on the dry dock.

Q. Do you know what this damage was? When this individual took the skiff and checked it?

A. Yes.

Q. What did that person say?

A. He brought it to Mr. Owens' attention.

Q. What did Owens say?

A. I wasn't there.

Q. Did this person in the skiff say anything to you?

A. Looks like there is something wrong down there—that is all he said.

Q. You were standing on the dock when you saw this sliver? A. Yes, sir.

Q. So that the sliver would have been four or five feet below you? Or how much?

A. I couldn't say. It is pretty hard to judge

(Deposition of Ted Engstrom.)

from the dock, but the water was quite clear and it was easily visible.

Q. That water in Lake Union is fresh water?

A. Yes.

Q. Do you know where the Olson & Wing Machine Works are? A. Yes.

Q. That is on the same body of water?

A. Yes.

Q. From your experience along the water canals and the lake, is the cleanliness of the water about the same?

A. I would say so. It depends on the sky, somewhat. When the weather is dark, the water is dark.

Q. Is the water generally muddier than at the Olson & Wing location?

A. I don't know. It is all the same, as far as I know.

Mr. Aiken: I have no further questions.

Redirect Examination

By Mr. Mills:

Q. Do you know when this matter of your seeing the sliver, with reference to when it was being put up on the dry dock—just roughly, what was the relationship in time?

A. I see so many boats and so many engines, I don't remember whether the boat ran down under its own power, or whether it was towed down. No, I couldn't answer the question.

Q. And you don't remember when it was, with

(Deposition of Ted Engstrom.)

reference to the time you were working on that job? A. No.

Q. How long were you on that job, approximately?

A. As far as I can remember, it was about 25 to 28 working days.

Q. And the situation that you saw was about how far below the waterline?

A. Well, that is awfully hard to say—to judge the distance when you are standing on the dock. I would say it was anywhere from one to two feet.

Q. The only inspection made at the time was by the man going out in a skiff? A. Yes, sir.

Q. But as far as you know, it was put up on the dry dock? A. Yes.

Q. Did you attempt any turning of the shaft without taking it out? A. No.

Q. When you say the No. 5 crankpin was exposed, how much of an operation is that—to open up and expose the No. 5 crankpin?

A. The No. 5 crankpin was exposed.

Q. Well, how much of a job would it be to open it up to expose it?

A. You mean, just take the inspection door off, and look in the base?

Q. For the purpose of the record, how would you go about looking at No. 5 crankpin?

A. You would take the inspection door off—it would take about five minutes.

Q. Just a simple operation?

A. Yes, sir. But the door was already off.

(Deposition of Ted Engstrom.)

Q. At the time you went up there?

A. Yes.

Q. And the first thing that called your attention to the fact there might be trouble was the presence of the babbitt? A. Yes.

Q. Could that have been from No. 5 crank pin?

A. It could have been.

Q. You have had eleven or more years of experience as a mechanical engineer with Fairbanks-Morse?

A. I have got in thirty years, altogether.

Q. Thirty years, all told? When you say these various indications are apparent to you, are you speaking from your standpoint as a professional expert on the subject? A. Yes, I am.

Q. Would they have been apparent to the layman, looking casually at the engine, in connection with looking at the boat?

Mr. Aiken: Don't answer that. I will object to that as calling for a conjectural answer, not having laid a proper foundation, and it is irrelevant.

Mr. Mills: You can answer the question.

The Witness: Are you referring to a layman, or to an operating engineer?

Mr. Aiken: I will object to the question on the same grounds.

Mr. Mills: Off the record.

(Discussion off the record.)

Q. (By Mr. Mills): Assuming, Mr. Engstrom, a logger who is logging in water, with some knowl-

(Deposition of Ted Engstrom.)

edge of tugs and of boats, and looking for a tug to purchase, would the trouble signs you have pointed out have been readily apparent on examination of the vessel by such a man?

Mr. Aiken: I object to the question as being without the scope of the issues in this action, and also as calling for a conjectural answer, and not proper testimony to be adduced from an expert witness.

Q. Can you answer the question?

A. No. That is a hard-put question.

Q. In your looking for these trouble signs, did you make some detailed examination to find those trouble signs?

A. No, I made the examination from the visual appearance.

Q. Did you take the measurements of the shaft, etc.? A. Later on, I did.

Q. But your first observation that the shaft was out of line was entirely visual?

A. There is only one way you can determine the actual condition of a shaft, relative to its being straight, and that is to remove the shaft and put it in a lathe, between centers.

Q. But in your visual examination and determination that there was something wrong, you had the benefit of some thirty years of experience in the field, and were then able to ascertain what the extent of the damage was by actual physical taking the engine down?

(Deposition of Ted Engstrom.)

A. That is right. May I say something?

Mr. Mills: Go ahead.

The Witness: Oh, I was just thinking—you can put it down if you want to, but I was speaking of the babbitt in the base. So far as an engineer is concerned—an operating engineer that had not been near the engine to take a look at the No. 5 piston, might have thought—and I might have thought it myself—that the babbitt in there was from the No. 5 bearing and from the No. 5 bearing alone, if I hadn't made a further examination.

Recross-Examination

By Mr. Aiken:

Q. In this situation, the babbitt was only under No. 5, but these other outward indications of internal injury were present? A. That is right.

Q. How were the other general conditions of the boat? You mentioned a sliver on the forefoot, and you mentioned the engine—what about the paint and the other fixtures—did you observe those?

A. Well, I would say that, of course, you must remember I wasn't interested in the general condition of the vessel, but from appearances, it was good.

Q. It was good? A. Yes, sir.

Mr. Aiken: I have no further questions.

Mr. Mills: No further questions.

(Witness excused.)

(Deposition concluded.)

Certificate

State of Washington,
County of King—ss.

I Hereby Certify that on this 12th day of April, 1951, at the hour of 3:00 o'clock p.m. at 656 Central Bldg., Seattle, King County, Washington, the deposition of Ted Engstrom, a witness called on behalf of the plaintiffs in the above-entitled and numbered cause of action, was taken before me, Glen W. Walston, a Notary Public in and for the State of Washington, residing at Vashon.

The plaintiffs appearing by Orville H. Mills, Esq. (of Messrs. Chadwick, Chadwick & Mills), their attorney and counsel; and

The defendants appearing by Wallace Aiken, Esq,. their attorney and counsel.

The above-named witness, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said as in the foregoing deposition set out.

I Further Certify that said deposition has been reduced to typewriting under my personal supervision; that the same is a true and correct transcript of the testimony of the witness, given on his said deposition; and that the original of said deposition has been retained by me for the purpose of sealing up same and directing to the Clerk of the Court, as required by law.

I Further Certify that I am not of counsel nor

attorney to either or any of the parties, nor am I interested in the event of the cause.

Witness My Hand and Official Seal at Seattle, this 23rd day of April, 1951.

[Seal] /s/ GLEN W. WALSTON,
Notary Public in and for the State of Washington,
Residing at Vashon.

[Endorsed]: Filed April 24, 1951.

[Title of District Court and Cause.]

DEPOSITION OF DAVID ELDON ERICKSON, A WITNESS ON BEHALF OF THE DEFENDANTS

Pursuant to stipulation for taking depositions, hereto annexed, on this 12th day of April, 1951, at the hour of 10:00 o'clock a.m., the deposition of David Eldon Erickson, a witness called on behalf of the Defendants in the above-entitled and numbered cause, was taken at 656 Central Building, Seattle, Washington, before E. E. Lescher, a Notary Public in and for the State of Washington, residing at Seattle.

Appearances:

The Plaintiffs Appearing by:
ORVILLE H. MILLS, of
CHADWICK, CHADWICK & MILLS,
Their Attorney and Counsel.

The Defendants Appearing by:

WALLACE AIKEN, of
EMORY & HOWE,

Their Attorney and Counsel.

(Thereupon the following proceedings were had and testimony given:)

DAVID ELDON ERICKSON

called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Aiken:

Q. Will you please state your name?

A. David Eldon Erickson.

Q. And what is your address, where do you live?

A. 1805 West 95th.

Q. Seattle? A. Seattle.

Q. And what is your present occupation?

A. Salesman for the Northern Commercial Company.

Q. In what division?

A. In the Marine Division, marine engines.

Q. What particular field or types of marine engines?

A. Well, we specialize in fishing boat engines and tugboats; and occasionally, we build boats and power them and sell the whole boat.

(Deposition of David Eldon Erickson.)

Q. Have you had experience in that field other than selling? A. I have.

Q. What is that experience?

A. With Olson and Winge Marine Works.

Mr. Mills: How do you spell that "Wing"?

The Witness: W-i-n-g-e (spelling).

Q. (By Mr. Aiken): Where are they located?

A. They are located at 4125 Burns Avenue, Northwest.

Q. In Seattle? A. That is right.

Q. And what were your duties there—what was their business?

A. Boat building and repairing.

Q. When were you employed by them?

A. I was employed in 1940. I started in 1940 and stayed with them until March of 1944, when I was inducted in the Navy. I returned in March of 1946 and stayed with the company until about October of 1948, when I joined the Northern Commercial Company.

Q. Are Olson & Winge still in business?

A. No, sir.

Q. And what was your capacity or duties with Olson & Winge?

A. I was assistant production manager.

Q. And what were your duties?

A. My duties were to oversee work done on vessels; to work with the owners, with respect to the type of work to be done, and the specifications, and to expedite materials; generally work in a supervisory capacity.

(Deposition of David Eldon Erickson.)

Q. And most of that work was with fishing boats and tugs? A. That is right.

Q. Are you acquainted with Mr. Anderson, the defendant? A. Yes, I am.

Q. And when did you first meet him?

A. In 1947.

Q. And what were the circumstances, or where did you meet him?

A. He had a power scow, the Lois Anderson, that we did some work on, and also he moored the Helen A, a tugboat—a surplus tugboat, at our dock.

Q. And the Helen A is the tug that is involved in this litigation? A. Yes, sir.

Q. Have you been aboard the Helen A, or were you aboard the Helen A during the period that it was moored there? A. Yes, I was.

Q. Are you acquainted with Mr. Owens?

A. Yes, I have met Mr. Owens.

Q. Where and when?

A. Mr. Owens came into the yard and inquired in the office if there was a tugboat for sale moored at our dock, and I said the only one that I knew of was Mr. Anderson's—the Helen A, a surplus tug. So he said, "Well, may I see it?" So I took him on board and showed him around the vessel.

Q. What did you show him? First, was there anybody else present at the time that you were on the vessel?

A. As I recall, there were some crew members present. I do not recall who in particular were present. However, when Mr. Owens came into the

(Deposition of David Eldon Erickson.)

yard it is, or was the general practice that we accompany them when they go aboard other boats that are moored at the dock, and I took him aboard and showed him around, and I told him everything that I knew about the boat.

I didn't know any prices, or anything of that nature. I just would do that for any customer that had his boats moored at our dock.

Q. What did you show him on board the vessel?

A. I showed him in particular the obvious damage that I had known about, because we had estimated the work to be done in connection with fixing it up, which were, mainly, the damaged crank journal in the main engine, and the damage in the stem.

Q. How did you know that the crank journal was damaged?

A. It had been pointed out to me by Mr. Anderson, and we examined it at the time, previous to this time when Mr. Owens came there, with a view of estimating the job and fixing the same up, and at the time the side plate was removed from the engine so that you could see in it with the crank throw removed from the journal.

Q. What was the condition of the stem?

A. The condition of the stem showed bruises and damage. However, there was not too much evidence of it from above the waterline, as I recall.

Q. Well, what was the damage visible above the waterline?

A. Well, it showed a bruise—bruises and slivers

(Deposition of David Eldon Erickson.)

from the stem. It was hard to determine exactly the extent of the damage.

Q. Could you describe it in comparative terms? Did it look like ordinary wear and depreciation?

A. No.

Mr. Mills: I object to that as leading. Let him describe it.

A. It was more obvious than that it was normal wear and tear. It definitely had struck an object of some nature.

Q. (By Mr. Aiken): And was this bruised condition from the deck down, or just where with relation to the waterline?

A. As I recall it, it was fairly close to the waterline; probably within a foot or two of the waterline.

Q. What color was the tug then painted?

A. It was the Army color. It was a sort of a bluish grey.

Q. And what was the general condition of the cleanliness of the vessel and the paintwork and the condition of the rest?

A. I would say average.

Q. And by "average," what do you mean?

A. It had just come down from the North, and it was moored at the dock, and they had not really started to clean it up for the next season. I say, therefore, it was average. It probably needed a coat of paint pretty much all the way around.

Q. And did Mr. Owens make any statement to you during this time that he was there other than

(Deposition of David Eldon Erickson.)

this preliminary conversation that you have related?

A. No, I do not think that Mr. Owens had much to say. I was more or less a disinterested person, anyway, and I just showed him what I knew of the boat, and I don't remember him saying anything in particular.

Q. Did he ask you, by the way, about the estimated cost of repairs?

A. I don't recall that he did.

Q. Was there any conversation about whether the vessel had been dry-docked?

A. I don't recall that, either.

Q. Prior to this, had you given any estimates for the repair of the vessel?

A. We had. Inasmuch as it was at the yard, it naturally was at the yard for some sort of repair work, and it had been discussed from the standpoint of the obvious damage shown, as to the extent of the damage, and we had made an oral idea of what we thought the damages would amount to, to fix it up, from what we could see.

Q. And to whom did you make that?

A. To Captain Anderson.

Q. To the defendant? A. Yes.

Q. And what was the price?

A. Approximately five thousand dollars.

Q. And was that in the nature of a firm commitment, or what?

A. No, it was not a firm commitment. It was just an approximate figure based on our experience.

(Deposition of David Eldon Erickson.)

However, when you open up the stem job of that nature, or of any nature, that is, in marine work, it is difficult to give an exact price until the work is opened up and you can actually see the extent of it. So it was an approximate estimate.

Mr. Mills: At this point, I would like the record to show that the plaintiffs move that the testimony given in response to the question be stricken, as to the estimate, on the basis that it was not a fair estimate, as shown by the testimony, of the repair of the actual damage, but it was merely an estimate without full knowledge of the damage, and that the response is, therefore, not material to any issue in this lawsuit.

Q. (By Mr. Aiken): Did you at any later time make any repairs on this vessel? A. No.

Q. And you have no personal knowledge of what repairs were thereafter made to the vessel?

A. No, I have not.

Q. Have you repaired in your experience vessels with somewhat the same bruises?

A. Oh, yes; we have made many similar repairs.

Q. And in making this estimate, were you considering your past experience with respect to the cost? A. Yes.

Q. And for the repair of the engine and the stem damage above the water, what would your estimate be?

A. For the repair of the engine and the stem damage?

Q. Yes, above the water.

(Deposition of David Eldon Erickson.)

Mr. Mills: Let me have an objection to that as irrelevant and immaterial, and not a proper question within the issues of this case.

That does not state the elements of damage which are involved in the repair in this case, and does not fix it as to time or other essential elements.

Q. (By Mr. Aiken): This conversation and visit by Mr. Owens was approximately when, do you recall?

A. Sometime in March of 1947, I believe.

Q. And that was before the sale of the vessel, of course? A. I think so.

Q. Now, back to this other point: Your estimate, was it one for work that was visible above the water, or did it cover or contemplate underwater damage?

A. Yes. That was based on what we felt we might find there. As I said before, it was strictly an estimate. It is difficult to find out exactly what a job of that nature is worth. I might add, as far as the engine work was concerned, we consulted Wilson Machine Works, whom we felt were the best people in town for the job of putting the crank journal in place. They have the tools, and we consulted them as to what their approximate idea of their part of the subcontract would be worth, so that we could base that in the estimate.

Q. And what was that figure?

A. I don't recall the exact figure.

Q. Mr. Owens didn't ask you anything about what it would cost to repair, did he?

(Deposition of David Eldon Erickson.)

A. I do not remember him saying a great deal of anything. He seemed to be interested in the tug, but I do not recall him having a great deal to say other than just looking about.

Mr. Aiken: I have no further questions.

Cross-Examination

By Mr. Mills:

Q. Will you fix the day of this visit by Mr. Owens at the very nearest that you possibly can?

A. Sometime in March of 1947 is about as close as I can tell, from the date of the sale. It was sometime prior to that. I cannot fix the exact date.

Q. Judging from the date of the sale?

A. Yes.

Q. Now, how did you fix the date of the sale?

A. Well, I understood you to say that it was around the first of April.

Q. You understood me to say that it was around the first of April?

A. Or someone in this room. I knew that it was sometime in March of 1947, but the exact date, I cannot tell you, sir.

Q. I may be in error, but I do not think that I heard the first of April mentioned. Have you discussed this with Captain Anderson?

A. No, not as far as the actual date is concerned. No, sir.

Q. But you have discussed the matter of your testimony with him, have you not?

(Deposition of David Eldon Erickson.)

A. He asked me if I recalled the incident and the tug, and I told him that I did, because, after all——

Q. (Interposing): I am interested in where you got the date of the sale.

A. Mr. Owens mentioned it just prior to taking this testimony, as I recall. He said, "Approximately, you will remember it was around the first of April."

Q. That was while we were off the record?

A. Yes.

Q. In your direct examination, you said that you took him around the vessel and showed him the obvious damage? A. That is correct.

Q. Now, what was the obvious damage?

A. The damage on the stem and the damage on the engine that I have mentioned.

Q. Let us take the damage on the stem first. Exactly where was the damage evidenced on the stem?

A. As I remember, it was a foot or two above the waterline. It showed bruises from there on down.

Q. A foot or two above the waterline?

A. Yes, as I recall, and then it showed apparently that there had been a blow even below the waterline, indicating that it could be into the forefoot.

Q. The vessel at that time was at Olson & Winge's Yards at——

(Deposition of David Eldon Erickson.)

A. (Interposing): Out at the foot of Eighth Avenue, Northwest.

Q. At the foot of Eighth Avenue, Northwest?

A. Yes, sir.

Q. In what is Salmon Bay?

A. Ballard or Salmon Bay.

Q. Out in Ballard? A. Yes, sir.

Q. The water there is rather riled and dirty, is it not?

A. It is not particularly clear, no.

Q. How far down could you see on the stem and forefoot?

A. Oh, you might see easily six inches.

Q. Six inches or so?

A. That is about all.

Q. Had you ever had the vessel out of the water? A. No.

Q. Had you ever gone down to inspect the forefoot below the waterline?

A. No, other than visual from the deck.

Q. Visual from the deck? A. Yes, sir.

Q. And it was limited to about six inches, visual from the deck?

A. I would say that that was approximately it.

Q. Now, in your estimate then you were going entirely upon what was shown above the waterline and what you could see within the six inches below the waterline; is that correct?

A. Yes, but we suspicioned that there was possibly some damage to the forefoot by the visual

(Deposition of David Eldon Erickson.)

examination. After all, we look at any number of boats, and give an idea of what we feel that the job would run and——

Q. (Interposing): But your suspicion as to the damage below would be predicated on what you saw above the waterline or within that six inches, as indicating the force of some blow there; is that right?

A. Yes, I would say that that is right.

Q. Did that indicate to you a blow of sufficient force to have completely shattered the forefoot down to the keel? A. It is possible.

Q. It is possible? A. Yes, sir.

Q. In your looking at it, did you contemplate replacing the stem and the forefoot down to the keel? A. Yes, I would say so.

Q. Did the damage to the forefoot, as you saw it, indicate a blow sufficient to have shattered the keel back from the forefoot?

A. Well, of course, that would be a very difficult question to answer. It would be necessary to look at it further in dry dock.

Q. Did it indicate that?

A. I would not think so.

Q. And did your estimate take into consideration any replacement of the keel? A. No.

Q. And you never went below the waterline?

A. No.

Q. Now, when you speak of an estimate, Mr. Erickson, generally you make an estimate of what

(Deposition of David Eldon Erickson.)

the cost is based upon a known factor condition; is that right?

A. As closely as we can tell, yes.

Q. And then when you get into the job and find that the facts indicate extensive or greater damage, your price goes up?

A. Well, that is only natural.

Q. That is right. And in this case, if you had gotten into it and found a shattered forefoot down to the keel, with a shattered keel back for a number of feet beyond the forefoot, your price would have gone up considerably, would it not?

A. Well, that is possible. It depends on how the job goes and how difficult it is to make any repairs, and it is not very long then that you do get a set contract, or we would give a set contract on a job of that nature, because there are always contingencies that arise.

Q. So that at best your figure——

A. (Interposing): Was an estimate.

A. Yes.

Q. Your figure here was purely an estimate?

Q. Without any survey of the vessel to find out——

A. (Interposing): Other than what we could see visually and again from the talk that we had with Captain Anderson as to the extent that he believed that the damage was.

Q. Did Captain Anderson tell you at that time what he had struck? A. I don't recall.

Q. Did he tell you what the damage was?

(Deposition of David Eldon Erickson.)

A. Well, he said that there was damage in the stem or in the forefoot.

Q. Now, Mr. Erickson, normally you would, of course, take the vessel up on the ways before making any final estimate as to the repairs, would you not? A. That is correct.

Q. So that actually your figure that you were discussing was purely and simply a preliminary figure based on what you could see above the waterline and down to six inches below the waterline, or roughly, six inches?

A. Well, it gives us a pretty fair indication of what we would expect.

Q. Now, what about the engine? Did you do engine work out there? A. Yes, sir.

Q. You spoke of subcontracting this.

A. The reason why I spoke of the subcontracting was the fact that the crank journal itself was scored, and as one firm in town made a specialty of grinding—grinding the shaft in place, so that they would not have to dismantle the engine entirely to make the repairs on the journal, that is the reason why we spoke of subletting it to that firm.

Q. I am a little confused on your term "crank journal"; is that what is also referred to as a crankpin?

A. Yes, it could be. The crankshaft has a number of journals—you see—and each journal is where a bearing is fastened to. There are main bearing journals and crank bearing journals, and this happened to be a crank bearing journal.

Q. In other words, there was one crank bearing

(Deposition of David Eldon Erickson.)

journal——

A. (Interposing): That was damaged.

Q. That was damaged as you saw it?

A. That is right.

Q. You had never taken the engine apart, or taken the engine down, had you? A. No.

Q. And the figure or estimate that you spoke of then is based merely upon that apparent damage—— A. (Interposing): That is right.

Q. To the one crankpin or crank journal?

A. That is right.

Q. And that is what you indicated to Mr. Owens as being damage to the engine?

A. Obvious damage.

Q. And as to the stem, what you indicated to Mr. Owens was what you could see above water and down to six inches below? A. Yes, sir.

Mr. Mills: That is all.

Mr. Aiken: I haven't anything further. Before the witness is excused, Mr. Mills, may we stipulate that the signature of the witness to his deposition is waived, and the reading over of the deposition by the witness is waived?

Mr. Mills: That is satisfactory to me.

Mr. Aiken: And do you, Mr. Erickson, waive the reading of your deposition and waive the signing of your deposition?

The Witness: Yes, sir.

Mr. Aiken: That is all. Thank you.

(Witness excused.)

(Deposition concluded.)

Certificate

State of Washington,
County of King—ss.

I Hereby Certify that on the 12th day of April, 1951, at the hour of 10:00 o'clock a.m., before me, E. E. Lescher, Notary Public in and for the State of Washington, residing at Seattle, Washington, at 656 Central Building, Seattle, King County, Washington, personally appeared, pursuant to stipulation for taking depositions, hereto annexed, David Eldon Erickson, a witness called on behalf of the defendants in the foregoing entitled and numbered cause, for the purpose of giving his deposition pursuant to the provisions of the Rules of Civil Procedure of the District Court of the United States.

Orville H. Mills, Esq. (of Messrs. Chadwick, Chadwick & Mills), appearing as attorney and counsel for and on behalf of the Plaintiffs; and

Wallace Aiken, Esq. (of Messrs. Emory & Howe), appearing as attorney and counsel for and on behalf of the Defendants; and

The above-named witness being by me first duly sworn to testify to the truth, the whole truth and nothing but the truth, and being carefully examined, deposed and said as in the foregoing deposition set out.

I Further Certify that the said deposition was taken down by me stenographically and thereafter reduced to typewriting under my personal supervision; that the transcript of the said deposition is a true and correct transcript of the proceedings

and testimony given on the taking of said deposition; and that the said deposition has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court as required by law.

I Further Certify that the signing of the said deposition by the said witness was expressly waived by counsel for the respective parties, and by the witness himself.

I Further Certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause.

Witness My Hand and Official Seal at Seattle, King County, Washington, this 23rd day of April, 1951.

[Seal] /s/ E. E. LESCHER,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Title of District Court and Cause.]

STIPULATION FOR TAKING DEPOSITIONS

It Is Hereby Stipulated by and between R. Boochever of plaintiffs' attorneys, and William Renfrew of defendants' attorneys, that on behalf of the plaintiffs the oral depositions of T. Engstrom, Orville Mills and H. A. Dent may be taken, and on behalf of the defendants, the oral depositions of Mr. Erickson, Mr. Dawe and Mr. Wilson may be

taken at such times, within thirty days from the date hereof, and places and by such officers as may be mutually agreeable to the firm of Chadwick, Chadwick and Mills of Seattle, Washington, representing the plaintiffs, and the firm of Emery and Howe of Seattle, Washington, representing the defendants, and that duly certified transcripts of said depositions, upon filing with the Clerk of the Court, shall be regarded as introduced into evidence to the same effect as though the testimony had been adduced in open court during the course of the trial of this cause, in the above-entitled case, subject to the court's rulings on such objections as may be made by counsel during the course of the taking of the depositions.

Dated as of this 26th day of March, 1951.

/s/ R. BOOCHEVER,
Of Attorneys for Plaintiffs.
/s/ WILLIAM W. RENFREW,
Of Attorneys for Defendants.

[Endorsed]: Filed April 24, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, M. E. S. Brunelle, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, and including specifically the complete record and file of such action, including the bill of exceptions, setting forth all the testimony taken at the trial of the same and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled cause by the above-entitled Court on November 30, 1951, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ M. E. S. BRUNELLE,

Clerk of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: No. 13313. United States Court of Appeals for the Ninth Circuit. Jack C. Anderson, Sr., and Jack C. Anderson, Jr., co-partners, doing business as Anderson & Son Transportation Co., Appellants, vs. A. E. Owens, Fern Owens, and R. F. Owens, co-partners doing business as Owens Brothers, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed March 24, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,313

JACK C. ANDERSON, SR., Et Al.,
Appellants,

vs.

A. E. OWENS, Et Al.,
Appellees.

APPELLANTS' DESIGNATION OF POINTS UPON WHICH THEY INTEND TO RELY ON APPEAL

Come now Jack C. Anderson, Sr., and Jack C. Anderson, Jr., co-partners, doing business as An-

derson & Son Transportation Company, defendants and appellants in the above-entitled cause, and pursuant to Rule 19 of the above-entitled Court set forth the points upon which they intend to rely on this appeal, namely:

1. That the trial court erred in overruling the motion of defendants made at the close of plaintiffs' case for judgment on the ground that the plaintiffs at the close of their case had failed to show that they were entitled to any relief against the defendants.

2. That the trial court erred in refusing to grant judgment in behalf of the defendants and against the plaintiffs at the close of all the evidence.

3. That the trial court erred in its findings of fact entered in this matter for the reason that such findings of fact are not supported by the evidence.

4. That the trial court erred in entering its conclusions of law in this matter for the reason that such conclusions are not supported by the evidence and are not supported by the findings of fact made by the Court.

5. That the trial court erred in entering judgment in favor of the plaintiffs and against the defendants or in the alternative that the court erred in the amount of the judgment as granted in favor of the plaintiffs and against the defendants in the event any judgment in favor of plaintiffs and against defendants was justified by the evidence.

6. That the trial court erred in granting any judgment in favor of the plaintiffs by reason of the fact that plaintiffs had ample opportunity to inspect the vessel in question and in fact did inspect the vessel in question and were not entitled to rely upon any alleged warranties.

7. That the plaintiffs in fact bought the vessel as it was and not on the basis of any affirmations of fact or warranties made by the defendants and that accordingly plaintiffs have not shown that they were entitled to any judgment against the defendants.

8. That the trial court erred in allowing damages against the defendants and in favor of the plaintiffs on account of matters not contemplated by the parties and for repairs to the vessel made by plaintiffs which were completely outside the scope of the discussions between the parties and not contemplated at all in the discussions between the parties.

9. That the trial court erred in admitting certain testimony and in excluding certain other testimony and in particular erred in admitting evidence of the cost of the vessel to the defendants while refusing to admit evidence concerning the sale price of the vessel by plaintiffs, all of such evidence having been admitted or excluded over the objections of defendants.

10. That the trial court erred in refusing to grant defendants' motion for correction of findings of fact and conclusions of law and defendants'

motion to set aside judgment rendered in favor of plaintiffs and to enter judgment in favor of the defendants or in the alternative for a new trial.

11. That insofar as here applicable defendants by reference incorporate as part of this designation exceptions made on behalf of defendants to the findings of fact and conclusions of law and the judgment rendered by the District Court in this matter and which exceptions are a part of the record on this appeal.

Respectfully submitted,
DAVIS & RENFREW,
Attorneys for Defendants-Appellants Jack C. Anderson, Sr., et al.,

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION CONCERNING PRINTING OF RECORD

It is hereby stipulated and agreed by and between Davis & Renfrew, attorneys for the appellants, and Faulkner, Banfield & Boochever, and John E. Manders, attorneys for the appellees, that the entire record in the above-entitled matter as submitted to the Court of Appeals by the District Court, including all exhibits introduced by both

parties, and together with this stipulation, and together with appellants' designation of points, shall be printed, except those certain portions hereinafter particularly set forth, which are not material to the determination of the questions raised by the appeal in this matter, and which may be omitted from the printed record by the Clerk of the above-entitled Court as follows:

1. Minute Order dated January 19, 1951, having to do with continuance of the trial date.

2. Motion to Set Cause for Trial, filed February 26, 1951.

3. Opening Brief of plaintiff in the District Court filed August 29, 1951.

4. Opening argument of defendant in the District Court filed September 19, 1951.

5. Reply brief of plaintiffs filed November 14, 1951.

6. Notation in file as of December 27, 1951, to the effect that the file had been mailed to Judge Folta at Juneau, Alaska.

7. Order requiring costs and disbursements to be included in the Judgment filed January 21, 1952.

8. Execution dated January 21, 1952.

* * *

10. Any and all direct interrogatories propounded to witnesses where such direct interrogatories are made a part of the deposition as filed insofar as they duplicate, the depositions as filed.

11. The two photographs which are admitted as exhibits may be considered by the Court as part of the record without including reproductions of such photographs in the printed record.

Dated at Anchorage, Alaska, this 7th day of May, 1952.

DAVIS & RENFREW,
Attorneys for Appellants,
By /s/ EDWARD V. DAVIS.

FAULKNER, BANFIELD & BOOCHEVER, and JOHN E. MANDERS,
Attorneys for Appellees,
By /s/ R. BOOCHEVER.

[Endorsed]: Filed May 14, 1952.

No. 13,313

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co.,

Appellants,

vs.

A. E. OWENS, FERN OWENS, and R. F. OWENS, co-partners, doing business as Owens Brothers,

Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLANTS.

DAVIS & RENFREW,
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Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLANTS.

I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is an appeal taken by appellants (defendants in the lower Court) from a final judgment rendered on the 27th day of November, 1951, by the District Court for the Territory of Alaska, Third Division, in favor of appellees (plaintiffs in the lower Court) and

against the appellants (defendants in the lower Court).

The District Court for the Territory of Alaska is a Court of general jurisdiction consisting of four divisions of which the Third Division is one. Jurisdiction of the District Court is conferred by Title 48, United States Code, Section 101. See also Alaska Compiled Laws Annotated, 1949, 53-1-1. Procedure in the District Court since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure which were extended to the Courts of the Territory of Alaska on that date. See 63 Stat. 445. See also 48 United States Code 103A.

Jurisdiction of this Court to review the judgment of the District Court is conferred by new Title 28 United States Code, Section 1291 and 1294 and the appeal is governed by the Federal Rules of Civil Procedure.

This action was commenced by filing of plaintiffs' complaint on the 19th day of October, 1948 (R 3 to 8). The complaint is for damages on account of alleged breach of warranty by defendants-appellants in the sale of a certain motor vessel. Defendants' answer was filed on February 11, 1949 and such answer controverts the allegations of plaintiffs' complaint (R 8 to 13).

The case was tried by the District Court from March 9, 1951 through March 19, 1951 and after completion of the testimony, by stipulation of the parties and by order of the Court, depositions of Howard A.

Dent, Orville H. Mills and Ted Engstrom were taken on behalf of the plaintiffs and the deposition of David Eldon Erickson was taken on behalf of the defendants. Such depositions were submitted to the Court along with the other testimony (R 401-402, 405-468, 29-33). The witness Dent had previously testified by deposition which was used during the course of the trial (R 14-18).

The journal entries of the trial Court concerning the trial of this action are found at R 19-26.

The opinion of the trial Court is found at pages 34 through 41 of the record. Findings of fact and conclusions of law of the trial Court are found at pages 41 through 48 of the record. The judgment of the trial Court is found at pages 49 and 50 of the record.

II.

STATEMENT OF CASE.

On April 1 of 1947 at Seattle in the State of Washington appellants as sellers and appellees as buyers entered into a certain written agreement by the terms of which the sellers agreed to sell to the buyers and the buyers agreed to buy of and from the sellers a certain United States Army war surplus tug known as the TP 100 which at that time was located on Lake Union at Seattle, Washington. The written agreement executed by the parties was admitted in evidence by the trial Court as Plaintiff's Exhibit 1 and is found at pages 78 through 82 of the record.

The written agreement above mentioned was drawn by Mr. Mills of the firm of Chadwick, Chadwick and Mills of Seattle and Mr. Mills at that time was the attorney for the appellees, A. E. Owens, et al., doing business as Owens Brothers (R 76, 190, 305, 406). Appellants had no attorney in Seattle and were not represented in this matter by independent attorneys (R 305).

The TP 100 had been purchased by Jack C. Anderson, Jr., at army surplus sale through the War Surplus Agency at Fort Richardson, Anchorage, Alaska, sometime in the spring of 1946 and at the time of the purchase it was located in Resurrection Bay near Seward, Alaska (R 358). The vessel was built in the year 1944 (R 138) and cost new approximately $250,000.00 (R 266). At the time the vessel was purchased by appellant Jack C. Anderson, Jr. it had a burned out bearing which was repaired by appellants before the vessel was used (R 287, 359).

After the vessel was purchased by appellant Jack C. Anderson, Jr. it was used during the navigation season of 1946 on Cook Inlet, Alaska (R 286-287, 359). During that period it was necessary to "baby the one cylinder" as it was giving a little trouble but otherwise the engine operated satisfactorily (R 287, 359).

Appellant Jack C. Anderson, Sr., maintained a winter home in Seattle and about the 10th of February, 1947, left Seldovia, Alaska, with the TP 100 accompanied by the power barge Lois Anderson for

Seattle (R 287, 359). Prior to starting the trip to Seattle the piston in the cylinder which had been giving trouble was disconnected and "hung up" so that the motor operated on five cylinders during the trip to Seattle (R 233, 236, 288, 360).

During the trip from Seldovia, Alaska, to Seattle, commenced on or about February 10, 1947, the motor operated in a satisfactory manner and without trouble (R 236, 288). In the course of this trip to Seattle the vessel TP 100 during periods of fair weather towed the barge Lois Anderson for the reason that the tug was a faster vessel than the barge (R 234, 288, 289, 360).

On the trip to Seattle in February of 1947 the tug TP 100 hit a rock and backed off. Upon a preliminary inspection, no leaks appeared and the vessel proceeded on to Seattle (R 234, 236, 289, 291).

After arriving at Seattle the tug TP 100 was tied up at a dock on Lake Union and appellee A. E. Owens saw it there and made inquiry as to whether it was for sale and thereupon had certain discussions with appellants which culminated in the agreement to sell and to purchase (Plaintiffs' Exhibit 1 above mentioned). For Mr. Owens' version of the conversation leading up to the agreement, on direct examination, see the record, pages 73 and 74 and pages 113 and 114. See pages 122 and 123 of the record for the testimony of the witness Owens on cross-examination as to these conversations. The only other testimony offered by plaintiff as to the conversations leading up

to the agreement is in the two depositions of Mr. Dent. The first of such depositions was taken February 17, 1951, and is found at pages 14 through 18 of the record. The second deposition was taken on the 10th day of May, 1951, and is found at pages 29 through 33 of the record. This second deposition made reference to a letter dated March 12, 1949, written by the witness H. A. Dent to Mr. Mills, appellees' attorney, and that letter is found at pages 26 and 27 of the record.

For testimony on behalf of appellants as to the conversations leading up to the making of the written agreement of sale see the testimony of the witness George Henry Saindon called on behalf of the defendants found at pages 239 and 240 of the record on direct examination and at pages 243 and 245 on cross-examination. See also the testimony of appellant Jack C. Anderson, Sr., at pages 297, 298, 300, 301, 302, 303 and 304 on direct examination, and pages 321 and 322 on cross-examination. See also the testimony of Jack C. Anderson, Jr. on direct examination which appears at pages 363, 364, 366, 367 and 368. For cross-examination of this witness as to the conversations leading up to the signing of the agreement, see pages 380, 381.

Mr. Owens, the appellee, knew at the time he purchased the vessel in question that it was an army surplus boat (R 121) and that it had been running on five cylinders (R 122). The vessel was never represented as being a new vessel (R 128). Owens looked over the vessel on several occasions prior to

making the agreement to purchase the vessel and had ample opportunity to inspect the vessel for all that he could see (R 128).

After the agreement dated April 1, appellants at the request of appellees moved the boat under its own power from one portion of Lake Union to another portion of such lake and appellee A. E. Owens went along on the vessel when it was moved.

Appellee first caused the defective crank pin to be turned or honed at a cost of $300.00 and later decided to have an inspection made of the motor and upon such inspection decided to remove the crankshaft. While the date of this decision is indefinite, it apparently took place some time prior to April 29, 1947 (R 151, 155). Plaintiff may have had such inspection made some time prior to April 20, 1947 (R 226).

Two dates have been suggested as the time when the $5000.00 down payment was transferred to appellants, April 22, 1947 and May 20, 1947. The testimony of Mr. Owens was to the effect that the transfer was made May 20, 1947 (R 133), and later that it was April 22, 1947 (R 186). The latter statement is based upon a claim that the witness' memory was refreshed upon seeing the letter from his attorney directed to appellants and dated May 17, 1947 (R 186).

First notice of claimed misrepresentations or breaches of warranty was given to defendants in a letter dated May 17, 1947, written by Mr. Mills as attorney for appellees and directed to appellants and received by appellants after their arrival in Alaska

somewhere around the 10th of June, 1947. This letter is Defendants' Exhibit "B" and was answered by a letter from appellants to Owens, Plaintiffs' Exhibit 20, which in turn was followed by a letter from Mills as appellees' attorney to appellants dated July 24, 1947, Defendants' Exhibit C.

Appellants remained in Seattle in 1947 until the third day of June (R 334).

This action was commenced on the 19th day of October, 1948, and resulted in a judgment in favor of the plaintiffs (appellees here) for the sum of $24,978.86 plus costs and attorneys' fees (R 49).

During the course of the trial and at the close of plaintiffs' evidence defendants moved for judgment which was denied.

After entry of the judgment defendants took certain exceptions to the Court's findings of fact and conclusions of law and to the judgment rendered and also moved to amend the findings of fact and conclusions of law and for judgment in favor of the defendants or in the alternative for a new trial and all of these motions were overruled summarily by the Court on the ground that they had been submitted without argument (R 62).

III.

SUMMARY OF ARGUMENT.

Appellants believe that on the evidence which is before this Court there is no evidence to justify a judgment in favor of appellees and against appellants. In that connnection it is submitted that there was no express warranty contained in the written agreement of sale unless it be inferred from paragraph I thereof that the vessel was sold "as is where is". It is further contended by appellants that under the parol evidence rule evidence of oral conversations leading up to the execution of a written agreement are incompetent and inadmissible and that since all of the evidence concerning alleged warranties in this case rest on parol evidence that defendants' motion for judgment at the close of plaintiffs' case should have been granted.

Irrespective of the parol evidence rule appellants contend that giving plaintiffs' evidence the best effect to which it is entitled such evidence does not justify any finding that there was any warranty made or that any warranty was breached or that plaintiffs were entitled to any general damages or damages on account of delay and for that reason appellants believe that the judgment rendered against them by the trial Court should be reversed and that the District Court should be ordered to dismiss the action or to enter judgment in favor of appellants.

In the alternative and for the sake of argument, but without admitting that any damages are due from

appellants to appellees, appellants claim that plaintiffs did not prove any proper element of damages in that their evidence was based upon a claim of damages because of alleged repairs made to the boat and not upon the correct measure of damages as to the difference of value of the boat between the condition of the boat as it was sold and the value of the boat had it been as warranted.

Appellants further contend that in the event any damages were justified in favor of plaintiffs and against defendants that the damages attempted to be proved are wholly speculative and do not justify a judgment for more than a small portion of the judgment granted by the trial Court. Appellants further contend that the item allowed for loss of profits is not a legal element of damages in the light of the record in this case and that in any event such element of damages as it was attempted to be proved is purely speculative and that the evidence is not sufficient to support a judgment in favor of appellees and against appellants on that point.

IV.

ARGUMENT.

Plaintiffs' complaint in this action alleged in paragraph III that defendants sold the tug TP 100 to the plaintiffs to be used in plaintiffs' business to the knowledge of the defendants and that defendants at that time warranted the tug to be fit and proper

in all respects for such use. In paragraph IV of the complaint it is alleged that plaintiffs relied on the warranty and attempted to make use of the vessel for the purpose aforesaid but when examination was made of the vessel it was ascertained that the same was not fit for or in a seaworthy condition to perform or engage in the purpose for which the same was purchased by the plaintiffs. In paragraph V of the complaint it is alleged that as soon as the unfitness was ascertained the plaintiffs notified the defendants thereof and of the estimated damages resulting therefrom and set forth with particularity plaintiffs' claim as to the defects in the vessel. Paragraph VII of the complaint alleges that defendants represented and warranted to the plaintiffs that the vessel as sold was in a sound and seaworthy condition with the exception of one scarred crank pin and bruised forefoot for which an allowance of $5000.00 was made by defendants to plaintiffs on the purchase price of the vessel. That the vessel was unseaworthy and unsound and plaintiffs were ignorant of the falsity of the representations and warranties and that plaintiffs relied on such representations and warranties in the purchase of the vessel. In paragraph VIII of the complaint plaintiffs alleged that at the time of the sale of the vessel defendants well knew that the vessel was not seaworthy and sound for the purpose and business in which the plaintiffs were engaged and that by such misrepresentations defendants had induced the plaintiffs to purchase the vessel and that the plaintiffs were misled and injured thereby and that the plaintiffs suffered damages to the amount of $32,000.00.

Defendants in their answer in paragraph IV alleged that they made no warranty concerning the condition of the vessel or of its fitness for any job contemplated by the plaintiffs and alleged that the vessel was sold on an "as is" basis. They further alleged that they had no knowledge concerning plaintiffs' contemplated use of the vessel and that the vessel was sold at a reduced price because of the scarred crank pin and the damaged forefoot and that the vessel was purchased by the plaintiffs after an inspection of the same and with full knowledge on the part of the plaintiffs as to the condition of the vessel and as to its fitness for their operations. In paragraph V of the answer defendants admitted that the vessel when sold had a scarred crank pin and that the forefoot had been damaged and alleged that the plaintiffs had full knowledge of such defects at the time of purchasing the vessel and that the plaintiffs purchased the vessel at a reduced price because of such defects. In paragraph VI of the answer defendants denied all plaintiffs' allegations as to misrepresentation and alleged that if plaintiffs had incurred expenses as alleged in their complaint that such expense was not incurred because of any action of misrepresentation of the defendants. In paragraph VIII of the answer defendants specifically denied that they had made representations to the plaintiffs as to the condition of the vessel or of its fitness for the work contemplated by the plaintiffs and alleged that plaintiffs had a full opportunity to inspect the vessel before purchasing the same and that plaintiffs did inspect the vessel. In paragraph X of the

answer defendants alleged that if in fact plaintiffs were denied the use of the vessel for a period of seventy-five days or for any other period that such loss was not the result of any action of the defendants.

Appellants believe that there are four questions involved in this appeal as follows:

1. Does the record support the findings and conclusions of law of the trial Court to the effect that the appellants made express warranties concerning the condition of the vessel upon which appellees would be entitled to any judgment for damages against the appellants?

2. Does the record support a finding of the Court that any warranties as to the condition of the vessel were breached by appellants?

3. Does the record support the finding of the trial Court that appellees were entitled to any damages against appellants as a result of the alleged warranties and the alleged breach of warranties?

4. If it is found that warranties were made and that those warranties were breached, what damages were suffered by appellees as a direct and proximate result of such warranties and their breach?

By motions for judgment made during the course of the trial and by objections to the introductions of certain evidence and of exclusion of other evidence and by exceptions taken to findings of the Court and the conclusions based thereon, and to the judgment as granted and by motion for new trial or for judg-

ment for the defendants and by motion to amend the findings of facts and conclusions of law as made by the trial Court, the defendants raised all of these questions during the trial of the case.

The contract in question was made in the State of Washington and appellants agree that the law of the State of Washington is the applicable law in determination of this cause as found by the trial Court. Appellants have been unable to determine any substantial difference between the laws of the State of Washington and the laws of the Territory of Alaska in connection with the issues raised by this case. As will appear from the Court's findings as well as from the evidence in the record all parties were residents of the Territory of Alaska and the Territory of Alaska was the forum for trial.

Washington as well as Alaska has adopted the Uniform Sales Act and the provisions of that act apparently were in full force and effect in the State of Washington at the time of making the contract in question.

As previously pointed out the sales contract between the parties concerning the vessel which is the subject of this action was in writing signed by both parties and such agreement was introduced in evidence as plaintiffs' exhibit No. 1 and is found beginning at page 78 of the record. This document says nothing about warranties, express or otherwise. The agreement does state in paragraph 1 thereof that the first parties (appellants here) agree to sell and the second parties (appellees here) agree to purchase

said TP 100 Army Tug and Passenger Boat .... *as presently equipped and where presently located,* at a purchase price of Twenty-Five Thousand Dollars ($25,000.00).

This instrument was drawn by the attorney for the appellees without independent counsel or advice on the part of the appellants and should be construed in case of doubt against the plaintiffs who caused the same to be prepared.

White v. Eagleson, United States Court of Appeals, Ninth Circuit, 193 Fed. 2d 567.

According to appellees, appellants had theretofore on numerous occasions made various oral representations and warranties concerning the vessel in question. According to appellees' attorney, who dictated the instrument in question, in his deposition when called as a witness on behalf of appellees, discussion was had on at least two occasions either while the agreement was being dictated or immediately prior thereto concerning representations. In that connection see record page 409, where such attorney was testifying concerning the conference that immediately preceded dictation of the agreement, to the effect that appellant Jack C. Anderson, Sr., had made a statement that he had a sale of the vessel being negotiated with other parties in Vancouver, British Columbia, and that such parties had thoroughly examined and inspected the vessel and were ready to go ahead at the price for which the vessel had been offered to appellees and that, while in the attorney's office, during that conference appellant Jack C. An-

derson, Sr. had received a telephone call and informed Mr. Owens in the presence of the attorney that the call was in connection with the sale of the vessel to the parties in Vancouver and that such parties were anxious to complete the deal and that if Owens wanted to take the vessel, that he would have to make a firm commitment on it at that time. On page 410 the question was asked of the witness as to whether Owens stated that he was willing to proceed on the basis that was then outlined, and the answer of the witness was that Owens indicated that he was ready to purchase the vessel if the vessel was as indicated and represented by Mr. Anderson. The witness went on then to inquire of Owens as to whether he had thoroughly inspected the vessel or had any competent marine engineer inspect it, and Owens told him that he had not, and then the parties engaged in a side conversation in which Anderson said that the vessel was as represented, and that they could proceed to close the transaction at that time. The witness was then asked as to whether Anderson had made any reference to any previous inspection and the answer was that in the course of the conversation he said that the Canadian parties had made a thorough inspection of the vessel and that the vessel was as Anderson had represented it to Mr. Owens. On cross-examination this witness testified that he had not been informed concerning the nature of the alleged representations, and that no representations were made by Anderson to Owens in his presence as to the condition of the vessel except that Anderson stated the vessel was as represented. The witness

stated that he did not know what the representation was because that was a subject of separate conversations between the parties. On page 420 of the record, the witness Mr. Mills stated that he was retained by Mr. Owens to draw the agreement and was paid by Owens for that service.

American Jurisprudence Volume 20 dealing with the subject of evidence at page 958, Section 1099, uses the following language in setting forth the so-called parole evidence rule:

> "It is a general principle that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing; in other words, the parol agreement is merged in the written agreement and all parol testimony of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent."

Among the cases cited in support of the proposition above set forth are several from the State of Washington, and among others is the case of *Fairbanks Steam Shovel Company v. Holt and Jeffrey,* 140 Pac. 394, to which reference will be made later in this argument. Also under that section is listed a relatively recent case from the State of Utah, *Garrett v. Ellison,* found at 72 Pac. 2d 449, 129 ALR 666 which

stands for the proposition that the parole evidence rule is founded upon the principle that when the parties have discussed and agreed upon their obligations to each other, and reduced those terms to writing, the writing, if clear and unambiguous, furnishes better and more definite evidence of what was undertaken by each party than the memory of man, and applies to exclude extrinsic utterances when it is sought to use those utterances for the purpose for which the writing was made, and has superseded them as the legal act.

In the instant case, all of the evidence concerning the alleged representations and having to do with alleged warranties is parole evidence. Since it is apparent that Plaintiffs' Exhibit 1 was the written evidence of the agreement of the parties concerning the sale of the vessel in question, it would appear that oral conversations leading up to that writing should not be admissible to show an agreement of the parties other than the written agreement. As set forth in the American Jurisprudence citation above "it is conclusively presumed that the entire agreement of the parties, and the extent and manner of their undertaking have been reduced to writing" and that the parole agreement of the parties has been merged in the written agreement.

The trial Court in its opinion apparently attempted to get around the parole evidence rule by using the following language found at page 35 of the record: "The agreement was executed on April 1, but the

agreement not only does not even refer to the condition of the tug, but its purpose apparently was to provide for immediate transfer of possession pending receipt of a bill of sale from the Army which was a pre-requisite to documentation." That language is followed in the findings of the Court in finding number 10 which reads as follows: "A written agreement was executed on April 1, 1947, but the agreement did not refer to the condition of the tug.", and in finding number 11 which reads: "The purpose of the agreement was to provide for immediate transfer of possession of the vessel pending receipt of a bill of sale from the Army, which was a pre-requisite to the documentation."

Appellants submit that Plaintiffs' Exhibit 1 is a complete contract and the only contract between the parties, and that although part of the purpose of the parties was to provide for immediate transfer of possession of the vessel, that that was only one purpose of the agreement and that the primary purpose of the agreement as shown by such agreement was a contract of sale between the parties binding on both of such parties, with the sale to be effected when first parties received a bill of sale to the vessel from the United States Army, and at such time as the vessel might be documented. Since the only language in the agreement which has to do with the condition of the vessel is in paragraph one and above quoted, it appears from the document itself that the parties did not intend any express warranties as to the condition of the vessel.

In that connection, appellants believe that it is evident that had the parties intended to make any express warranties or representations, that certainly appellees' attorney who drew the contract would have seen to it that such warranties were specifically included in the agreement for the protection of his client. Appellants further believe that a fair inference can be drawn from the agreement and from the circumstances surrounding its signing that express warranties as to the conditions of the vessel were not put in the agreement for the sole reason that it was understood by all of the parties that appellants were selling the boat "as is" and that appellants would not have signed the agreement had it contained any warranties whatsoever.

Appellants believe that this inference is strengthened by the fact that appellants had another sale for the vessel, at the same price offered by appellants, made by persons who had made a thorough examination of the boat, and that this situation was known to appellees at the time in question, and that appellees' sole consideration at the time was to tie up the deal with appellants so appellants would not sell the boat to the other parties. Adding to all of these circumstances, the further circumstances that the attorney who drew the agreement in question was acting for and on behalf of the appellees, and that as a matter of law the agreement must be construed against appellees for that reason, it seems absolutely incredible that appellees should now claim

that express warranties were made concerning the condition of the vessel in question.

Irrespective of the parole evidence rule and its effect in this case, appellants believe that on plaintiff's own evidence the record does not support a judgment in favor of the plaintiffs and against the appellants, and that defendants' motion for judgment made at the close of plaintiffs' case should have been granted by the Court, and that this Court should reverse the judgment of the trial Court and dismiss the action.

It should be kept in mind that the alleged misrepresentations or warranties were made in the month of March, 1947. The case was tried in the month of March, 1951, four years later. The only evidence on behalf of the plaintiffs as to the alleged misrepresentations or warranties was given by the plaintiff A. E. Owens and by Howard A. Dent apparently a former business associate of plaintiff A. E. Owens. The evidence of Mr. Dent was given by deposition and as will be pointed out subsequently in this argument, such deposition is open to severe criticism.

The testimony of the plaintiff A. E. Owens concerning the alleged misrepresentations and warranties is extremely brief. It begins at page 73 of the record where Owens testified that he was down at the dock in Ballard with Tom Morgan and that the tug TP 100 was laying there at the dock and that Morgan told him it was for sale and took him and introduced him to Mr. Anderson. The testimony then continues as follows * * * "and then Mr. Anderson and his son

both took me through the boat and specified at that time the only thing that was the matter with the boat was one crank pin to be turned and that the forefoot of the boat had been bruised in striking a log on the way down to Seattle.

"Q. Did he make any other representations to you about the boat at that time?

A. He represented that it was in first class condition with those exceptions.

Q. Did he state anything about whether the boat was leaking or not?

A. He stated that it wasn't leaking, that the boat was tight. There was no evidence in the back part of the boat that it was taking any water.

Q. Was there any discussion of terms?

A. At that particular moment I think not. He stated their price for the boat was *$25,000.00 if we took it as it was there, or they would put it in first class condition for $30,000.00.*

Q. And did he say anything about how much it would cost to put it in first class condition?

A. He said that it wouldn't exceed $5,000.00 to put it in first class condition.

Q. Now did you see Mr. Anderson again?

A. I saw him several different times. I think the next time I saw him I took Mr. Howard Dent down there to look over the boat with the idea of financing it for me, and he made the same representations to Mr. Dent and myself that he had before."

Later in his direct examination the witness Almon E. Owens testified as follows beginning at page 113 of the record:

"Q. In what way, if any, did he misrepresent the vessel to you.

A. He misrepresented the vessel to us in the extent that he told us it would be less than $5,000.00 to put the vessel in first class condition. That was the representation I bought it on."

And on page 114 of the record:

"Q. Now were there misrepresentations in regard to specific things wrong with the boat?

A. That is true.

Q. And in what way were they misrepresented?

A. In regard to the engine, that the only thing the engine needed was one bearing or crankshaft bearing to be re-turned, and that the only thing the bow needed was a smoothing up of the forefoot * * * we purchased the vessel for $25,000.00 with a definite understanding that the repairs would cost less than $5,000.00.

Q. And was there a definite understanding as to what the condition of the vessel was?

A. That is true.

Q. What was the understanding?

A. That it was in first class condition with these two exceptions.

Q. The two exceptions which you previously mentioned?

A. That is correct."

On cross-examination, the same witness testified as follows beginning at page 122 of the record:

"Q. Now, Captain Anderson took you and showed you all over this boat didn't he?

A. That is right.

Q. And the engine plate was off where this particular piston was hung up, wasn't it?

A. That is right.

Q. And Captain Anderson explained to you that he had been running that vessel for a considerable period of time on five cyclinders with this particular connecting rod detached from the crankshaft, did he?

A. That is right.

Q. And now when Mr. Anderson first offered this boat for sale to you, what was the price?

A. $25,000.00 for us to do the repair work as he specified, or he would do the work himself for $30,000.00.

Q. Well, at first he said, 'I will fix the boat up and you can buy it for $30,000.00, or if you want to take it and fix it up it will be $25,000.00', isn't that right?

A. I think that is correct."

The witness was positive whenever asked a question as to whether he had not bought the vessel "as is" but it seems to the writer of this brief that irrespective of his conclusion as to whether he bought the vessel "as is" or not that the only reasonable interpretation of the language used as set forth by the witness was that he did buy the vessel "as is". The only reasonable explanation would seem to be that appellee after examining the boat on numerous occasions as disclosed by the record believed that he could repair the boat under the $5,000.00 differential between the "as is" price and the price if appellants repaired the boat, or that he was getting such a good bargain in the boat at that price that he believed

he could afford to pay whatever might be necessary in repairs in order to secure the boat.

While it is generally true that in the case of conflict of evidence the Appellate Court will not upset a finding made by the trial Court based upon such evidence, appellants believe that appellees' testimony and the interpretation he put on the language which he admits was used by the parties is so vague and uncertain and in fact so preposterous that this Court is entitled to consider as to whether in fact there was any competent evidence that any representations were made by appellants to appellees. Of course appellants take the position that the language used did not amount to representations or warranties in any event.

It is singular how positive the witness A. E. Owens was concerning the so-called representations which were made to him by the appellants and concerning his reliance on those representations and how vague and totally unsatisfactory his evidence was in other respects.

As a sample of the testimony of Mr. Owens, the writer would like to call the attention of the Court to the testimony of that witness on cross-examination commencing at page 125 of the record where Mr. Owens is being asked concerning a conversation he had with Anderson about the Canadian people who wished to buy the boat as follows:

> "Q. Well, I am not talking about what was said to him on the telephone. I am talking about what he said to you. Did he not, while he was

talking on the telephone, turn to you and say, 'Mr. Owens, the Canadian people want to buy this boat now, and, if you want it all right; if you don't, say so,' and did you not at that time say to him, 'allright; it is a deal. I will put the $5,000.00 in the bank for you. Tell them it is sold.'

A. *I would say that my memory is a little hazy as to what transpired at that time.*

Q. All right, if your memory is hazy, we will let it go. Now, did you talk with anyone else in Seattle prior to the time you purchased this vessel, the TP 100, now known as the Adak, about the condition it was in?

A. I don't know that I did.

Q. To refresh your memory, didn't another man attempt to sell you a boat and tell you that he knew the condition of the TP 100 and that the crankshaft was absolutely no good in it and would have to be removed?

A. I have no knowledge of anything of that kind.

Q. You don't have any knowledge of it?

A. No sir * * *

Q. Well, now, did Mr. A. W. Dawe and Mr. Oaksmith talk with you prior to the time you bought the TP 100?

A. No, sir.

Q. Do you deny you had a conservation with them in Seattle?

A. I don't remember that.

Q. Just a minute until I finish the question, sir. Do you deny that you had a conversation with them in Seattle previous to the time you purchased the TP 100 in which they told you that the TP 100 crankshaft was flat and would have

to be removed and the boat was in bad shape and they tried to sell you a boat they had. Do you deny that?

A. I have no knowledge of that at this time.

Q. You mean you can't recall it or you deny it?

A. I can't recall it.

Q. Do you likewise deny that you stated to them, 'Gentlemen it is all a matter of terms with me. I haven't the cash. Therefore, I have to buy the TP 100 because I can buy it on good terms'? Do you deny that conversation?

A. I have no reason to deny it. I don't know that the thing happened at all.

Q. Well, Mr. Owens, there is nothing wrong with your memory that you know of?

A. This was four years ago. Some things I have reason to remember, and others I don't.

Q. Do you mean to tell me that all the expense and difficulty you had with this boat, that you would not remember such a conversation if it took place?

A. I don't remember that it took place."

At page 129 of the record appears the following testimony of the witness A. E. Owens:

"Q. Now, you admitted, however, did you not, Mr. Owens, that you never at any time questioned Captain Anderson as to whether the vessel had ever been out of the water from the time he purchased it?

A. That I don't remember.

Q. Well, now, didn't you know how Jack Anderson purchased that boat?

A. I didn't know at that time.

Q. Well, did you know before you agreed to buy it?

A. No."

The attention of the witness was then called to exhibit one which specifically sets forth that the vessel was purchased from the War Surplus Agency at Fort Richardson, Alaska, and then the question was asked:

"Q. Now, certainly you knew at that time that Captain Anderson had purchased this boat at the Army Surplus at Fort Richardson, didn't you?

A. That is true.

Q. You knew that he didn't even have a bill of sale from Army Surplus when you bought it; isn't that right?

A. I wouldn't say that it was or that it wasn't, I didn't know whether he had a bill of sale or not at that time."

The attention of the witness was then called to paragraph II of exhibit one and on being asked as to whether that refreshed his recollection he said that that was correct.

At page 169 of the record, the following testimony of Owens appears:

"Q. All right. And now, when you testified this morning that he knew you were going to use this vessel in the lumber industry up in Alaska, actually what you told him was that you wanted the boat to go South?

A. I wanted to go down and get a barge down there, that we had bought down there.

Q. Isn't that what you told him?

A. I don't remember what I told him."

In this connection we call the Court's attention to the testimony of two independent witnesses who have no interest whatsoever in the outcome of this case. Gerald Mason Oaksmith was called as witness on behalf of the defendants. His testimony commences at page 272 of the record as follows:

"Q. Were you acquainted with this TP Boat 100?

A. Yes sir.

Q. And did you ever talk to Mr. Owens about the TP 100?

A. Yes sir.

Q. When?

A. In the spring of 1947.

Q. Do you know the approximate month?

A. Approximately in the month of March.

Q. And where did you have this conversation with him?

A. In my automobile in the front of Pan American Airways office on Fourth Avenue, in Seattle, Washington.

Q. Now, would you state what the conversation was and who was present and the approximate time?

A. I had driven my younger brother, Stanley Oaksmith, from Ketchikan, to Pan American Airways Office. * * * My brother went into Pan American Airways office, and he came out with Mr. Owens. He introduced me to Mr. Owens as a logger from Ketchikan, a customer of his Ketchikan Airways flying company, who was looking for a tug boat. Mr. Owens stated that he had been looking at one TP boat in Seattle and was contemplating purchasing it. This TP boat was

the TP 100 owned by Jack Anderson. I told Mr. Owens that this tug had all the indications of having a bent crankshaft, and that before he bought it he should have it very carefully surveyed because of this possible fault. I told him that the tug had burned out a bearing when the Army declared it surplus at Seward. She was tied up with a burned out bearing, and that Jack Anderson bought her knowing that she had a burned out bearing, and put bearings in after that. I further told Mr. Owens that Mr. A. W. Dawe who was sitting in the back seat of my automobile, who was from New Westminister, B. C., and had two tugs on tap of similar design which he wanted to sell. Mr. Owens and Mr. Dawe talked for a few minutes and then Mr. Owens said he was staying at the New Washington Hotel and if Mr. Dawe were going to stay in town that night, he would make reservations for him at the New Washington Hotel so that he could stay at the same hotel. They both decided then to do that and meet later, and what they said from there I don't know. But I told Mr. Owens that the only possible way of telling whether this crankshaft was bent was to put it in a lathe and, that to spend $25,000.00 for this tug, when he could buy another tug of similar design for $35,000.00 without a bum crankshaft, was throwing money away.

Q. Now did you ever have a conversation with him after that?

A. The second time that I saw Mr. Owens was at 740 Westlake North, the Stikine Machine Works in Seattle. At that time Mr. Owens had purchased the TP 100 from Mr. Anderson. I

asked him at the time why, after my telling him of the possible damaged crankshaft, he had bought the vessel. Mr. Owens stated that the terms that Jack Anderson gave him on the tug was the deciding factor in his purchase of that tug and that he didn't have the necessary financing to spend thirty-five or forty thousand dollars on another tug."

The Court will remember that the witness A. E. Owens had already admitted knowing Mr. Oaksmith and on cross-examination had refused to deny that he had had such conversation with Oaksmith but said that he didn't remember whether he had such conversation or not.

On rebuttal at pages 396 and 397 of the record Mr. Owens admitted that he had had a conversation with Mr. Oaksmith at the Pan American Airways office in Seattle and stated that he had not remembered that conversation prior to Mr. Oaksmith's testimony and stated that he did not recall the conversation in question and did not remember the man Dawe although he wouldn't say that he hadn't seen Mr. Dawe.

The witness George Henry Saindon called on behalf of the defendants testified as appears at page 239 of the transcript that he had overheard a conversation between Mr. Owens and Capt. Anderson to the effect that Anderson told Owens about the shaft and that Anderson mentioned about removing the stack and taking the shaft out through the stack and at page 240 of the record the witness testified that in the same conversation between Anderson and Owens

he heard the price spoken of, *"as $25,000 as she sits, as is"*, and Anderson also said that $25,000 as she sits and $30,000 if he fixed it up.

"Q. If Anderson fixed it up?
A. Yes."

On rebuttal Mr. Owens testified on cross-examination as to that conversation as follows:

"Q. Now when you were—going back—when you were having your conversation with Mr. Anderson, you heard Mr. Saindon testify that he overheard a portion of that conversation while you were in the engine room. Do you recall Mr. Saindon being there?
A. I don't recall his being there at all.
Q. Could he have been there?
A. That is possible.
Q. Now, Mr. Anderson stated that you agreed to take the vessel as is where is. Was that ever said to you?
A. No Sir.
Q. Any such agreement reached?
A. No Sir."

Being charitable, it appears that Mr. Owens' recollection of the conversations had four years before was not very good.

As the writer understands it, the testimony of Mr. Dent, having been given by deposition, this Court can consider such testimony as though it were being considered for the first time by this Court. That testimony too leaves considerable to be desired. In answer to the seventh interrogatory on the first dep-

osition the witness stated the conversation took place on the date mentioned and as they were interested in disposing of the boat and Owens needed it for his logging business he was endeavoring to buy the boat, and in going over it he was advised that it had just returned from Alaska and was in good shape except that they had hit a *log or rock* and that it might need some minor repair and while the engine did not run Anderson advised us that with the exception of one bearing the engine was in first class shape and that for the sum of not to exceed $5000 the boat could be put in first class condition.

After the trial a second deposition was taken from the witness Dent and in order to refresh his memory as to what took place, he was asked concerning a certain letter he had written on March 12, 1949, to Mr. Orville H. Mills, attorney for Owens. On the face of that letter it appears that it was written as a result of a letter just previously received from Mr. Owens concerning the deposition and concerning the purchase of the boat. What was in the letter from Owens we do not know but in view of the fact that the letter written by Dent uses almost exactly the same words as were used by Owens in his testimony we believe it is a fair inference that Owens in his letter to Dent had attempted to refresh Dent's memory as to what he thought had happened at the time in question. It is particularly interesting that in that letter, written some two years after the supposed conversations and some two years before Dent's testimony on the first deposition, Dent claimed that

appellants had said that the vessel in question had hit a log. In Dent's first deposition he stated that the appellants in that conversation had stated that they had hit a *"log or rock"*. Since it is admitted all the way around that what actually was hit was a rock it seems quite likely that Dent's remembrance in his first deposition was better than his remembrance at the time he wrote the letter immediately after receiving a letter from the plaintiffs but in any event on the second deposition Dent claimed that now his memory had been refreshed by reason of reading the letter he had written two years before and accordingly on his second deposition the witness stated positively that Mr. Anderson had stated that the object struck was "a log".

We think it self evident that Mr. Dent had no independent recollection whatsoever as to what conversation took place between plaintiffs and defendants.

Remington's Revised Statutes of Washington, 5836-12, being a part of the Uniform Sales Act adopted by the State of Washington, defines express warranty as follows:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

The case of *Getty, et al. v. Jett Ross Mines, Inc.,* 159 Pac. (2d) 379, was decided by the Supreme Court of Washington in the year 1945. That case was tried on the theory of alleged fraudulent misrepresentations, and for damages for alleged misrepresentation or breach of warranty. That case is very similar in many respects to the case here under consideration. The defendant in that case was the owner of a certain dragline which had been used for several years and placed in storage needing repairs. Plaintiffs purchased the machine in question for the sum of eight thousand dollars, three thousand dollars down and one thousand dollars per month. The plaintiffs made some of the monthly payments and then defaulted. When the machine was repossessed on behalf of the owners, plaintiffs sued for damages for alleged misrepresentation. Plaintiffs' complaint contains allegations as to misrepresentations, as to the falsity of the representations, as to reliance of the plaintiffs upon the representations and as to plaintiffs' alleged damage which are strikingly similar to the complaint in the instant case. The suit was tried to the Court without a jury and findings of fact and conclusions of law and judgment were entered in favor of the plaintiffs and against the defendant for some $3000.00 in damages together with costs and subject to a credit in favor of the defendant for the balance still due on account of the purchase price. The seller in that case, as in this, had made motions to dismiss and for judgment at the close of the plaintiffs' case and took exception to the findings and to the conclusions and

the judgment of the trial Court and the refusal of the trial Court to grant judgment in favor of the sellers in accordance with the prayer of the cross-complaint. In that case, as in the case here, there were certain obvious defects in the machine which were pointed out to the prospective purchaser. Apparently there were other defects in the machine which were not known to either of the parties similar to what is claimed in the instant case. At the time the buyers first saw the machine apparently the motor was partly disassembled. At the time of the trial respondents claimed that Mr. Ross for the owners of the machine in the month of May, 1942 stated to them that he had completed repairing the motor and that they informed him that at that time the dragline was to be used by a construction company in constructing a war plant. One of the witnesses for the buyers testified that Mr. Ross had said that the machine was in A-1 condition with two exceptions: the motor needed repair, and the drive sprocket was worn and needed rebuilding. This witness said that on another occasion that Ross had told him that the machine was in good shape. Another of the buyers testified that Mr. Ross said "it was a pretty fair old machine." Another witness called on behalf of the buyers said that Ross had said that he thought the dragline used as a crane "would work out pretty good". The Court in summarizing the case used the following language:

> "Mr. Ross stated that the machine was for sale and that the price was $8,000.00 net; but it does not appear that he made any special effort to find

a purchaser other than to permit Mr. Rowe, Mr. Field and respondents to inspect the machine. Apparently respondents sought Mr. Ross in connection with the prospective purchase. When Mr. Field examined the machine, it appears that he was permitted to make any investigation concerning its condition that he desired and that under existing conditions it was possible for him to make. Mr. Field and respondents testified that Ross stated that subject to repairs to the motor the dragline was a fairly good machine, capable of operating two or three months without need for major repairs. During the month of May, Ross informed respondents that the repairs to the motor had been completed. Thereafter the dragline was in storage for over a month, so far as it appears, subject to examination by respondents. Mr. Ross had taken the motor down for the purpose of repairing it for his own use prior to the time Mr. Field and respondents saw the dragline. Mr. Field made it clear that, if he decided to use the machine, he would desire to place it in operation before making his final decision. When Mr. Field decided not to use the machine, naturally he did not attempt to operate it. Respondents undoubtedly knew all that Mr. Field knew concerning the dragline * * *"

At page 385 the Court uses the following language:

"When coupled with the undisputed evidence concerning the conduct of respondents after their purchase of the machine the entire record convinces us that respondents received the machine in just about the condition they anticipated. They knew they were buying a second hand dragline

which had been much used. It clearly appears from the record that such machines were in great demand."

Again at page 386 the Court uses the following language:

"While it does not appear that any agent of appellant ever suggested to respondents that they test the dragline by operating it, the record discloses no request by respondents that they be permitted to so test the machine. Apparently respondents never examined the dragline save and except as above set forth, though they had every opportunity to do so. At least some of the statements made by Ross, and upon which respondents rely as warranties, fall within the class of estimates or 'sellers praise' and do not fall within the classifications of statements upon which the buyer of second hand machine may rely without investigation.

"Respondents knew of course that the dragline had been used and was definitely second hand. Their attention had been called by Mr. Field to the fact that certain portions which he named were only 50% efficient, and he estimated the machine as a whole (with the motor repaired) as no more than 65% efficient. That was the machine for which respondents offered to pay two-thirds, or a little less, of its cost new. Such machines were in great demand. This one was rented for over $800.00 per month."

At page 388 the Court uses the following language:

"In the case at bar, the dragline was shown in the open, under no camouflage whatsoever. Re-

> spondents and Mr. Field made every examination thereof that they could make. Respondents knew that they were buying a second hand dragline, although the purchase was not completed for many weeks after examination by Mr. Field.
>
> The burden of proof rested upon respondents to prove the allegations contained in their amended complaint. We are convinced that they did not meet that burden. The Court has given due weight to those findings of the trial Court which are based upon disputed testimony.
>
> We hold that the evidence preponderates against the findings."

The Court then reversed the judgment of the trial Court with instructions to enter judgment in favor of the seller appellant.

In the instant case, assuming for the purpose of argument that representations were made as claimed by appellees it seems clear that such representations at best were statements of opinion or of value and were at most "seller's praise". The defects in the vessel upon which the trial Court granted damages in favor of appellees and against appellants were the very defects pointed out to the buyers by the sellers and while it is probable that neither of the parties knew the extent of those defects still the buyer certainly knew of such defects and had information from what he was told by the appellants as well as from his own personal observation so that if he wasn't satisfied he should have made further investigation.

Appellee's continued assertion that he relied solely upon the representations which he claims the appellants made is absolutely incredible especially in view of the testimony from the independent witnesses to the effect that he had been warned of probable further damage and in fact according to one witness had discussed the probable further damage with appellant Jack C. Anderson, Sr.

From the whole record appellees were not entitled to rely upon the alleged warranties and in fact did not rely upon the same. The only reasonable conclusion is that appellees thought they were getting a bargain and acted accordingly with their eyes wide open. In that connection and in conjunction with another phase of the Washington case just cited, it is interesting to note that plaintiffs knew everything about the tug TP 100 as early as somewhere between the middle of April and the end of April, 1947, that they knew at the time of the trial. According to the testimony of the witness A. E. Owens, prior to the time that his memory was supposedly refreshed by showing him a letter from his attorney, the transfer of the vessel took place on the 20th of May, 1947 and until that time he had paid no money whatsoever in the purchase of the vessel. At that time he could no doubt have rescinded his agreement if warranties had been made and breached but he didn't want to rescind the purchase. In fact A. E. Owens testified that he had spent nothing except $300.00 before he discovered the extensive damage to the engine which he claims existed and when asked why he didn't

rescind the sale at the time he said that he didn't rescind it because he wanted the boat. See R 152 and R 155. After discovering the supposed damage appellee went right ahead overhauling the motor and completely refurbishing and rehabilitating the vessel, and then attempted in effect to secure the vessel for nothing by making a claim for damages, in an amount greater than the purchase price, for alleged breach of warranties. Appellants feel that that is not the law and that the judgment of the lower Court should be reversed and the case dismissed.

Appellants desire to call the attention of the Court to the case of *Smith v. Bolster,* 125 Pac. 1022 and the case of *Lent v. McIntosh,* 186 Pac. (2d) 626, both decided by the Supreme Court of Washington.

In the first of such cases the seller apparently represented that the automobile in question was "in first class condition as good as any new car" and that it would average 11 miles to a gallon of gasoline. The Court held that in view of the fact that the price paid was considerably under the price of a new car that the expressions used were nothing more than the expression of an opinion as to the car's condition or what the law sometimes terms "seller's praise" and in reversing the judgment said:

> "We are of the opinion that there was neither warranty nor breach and that the judgment of the lower Court in so holding is error."

In the *McIntosh* case, above cited, as in the case at bar, apparently the seller made an estimate of

the cost of making the repairs. The Court in its opinion at page 631 uses the following language:

> "There is no testimony tending to show that McIntosh actually knew of the condition of the cylinder walls and the transmission case, of which respondent now complains, and respondent does not claim that appellant knew of these defects, but his argument is to the effect that appellant should have known or that appellant is liable under the following rule:
>
> > 'If a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, if the representations are false, it is immaterial if he did not know they were false, or that he believed them to be true.' * * *
>
> There is no testimony that Mr. McIntosh was ever asked anything about the transmission case or the drive case assuming that they are the same and that the court was referring to the crack found in the transmission case, until after the sale was completed, * * *
>
> While, as stated, appellant told respondent that he had repaired many parts of the machine to the extent of $1000.00, and had put on a new bull dozer attachment, there is no testimony to indicate that appellant knew of the condition which respondent claims he found in the cylinder walls and the transmission case, or that appellant had trouble with those particular parts.
>
> There is no question but that respondent had trouble with the machine practically from the time he started to operate it, and the testimony shows that he expended considerable money in

repairing various parts of the machine, but again we state that the testimony shows the machine bore the evidence of having had considerable use, and Peterson, at least, from his experience, must have known that such machine, from the very nature of the work in which they are engaged, got a great deal of hard usage. * * *

Assuming only for the purpose of argument that there was some testimony to support the finding that appellant represented the machine to be in good merchantable and operating condition, it is our opinion that this statement did not constitute such a fraudulent representation as to warrant a recovery in this case."

Appellants submit that the evidence before the Court does not support the finding of the trial Court that the vessel was warranted by appellants or that any warranties were made such as to induce the plaintiffs to purchase the vessel in reliance thereon or that the plaintiffs purchased the vessel in reliance on any warranties made by defendants or the conclusions of the Court that it was the intention of the defendants that the plaintiffs should rely on any warranties. On the contrary the evidence justified the inference that the vessel was sold without any warranties whatsoever on an "as is where is" basis and plaintiffs bought exactly what they thought they were buying. The testimony of the witness Oaksmith was never denied and stands undisputed on the record. From that testimony it appears that plaintiff A. E. Owens knew that he could buy a similar boat for the sum of $35,000 "without a bum crankshaft". (R 273.)

Both Mr. Owens and his witness Dent testified that appellants represented that the vessel could be put in first class condition for $5000. We submit that even using the language between the parties as testified to by plaintiff and his witness, the best that could be said of such language from the standpoint of plaintiff was that Anderson said that he would put the boat in first class condition and deliver it to plaintiff for $30,000.00. It was never intimated anywhere that defendant intended to guarantee that plaintiff would not have to expend more than $5000 to put the vessel in first class condition.

Incidentally it seems clear from the testimony of all parties herein that there was never any intention on the part of the sellers to sell the vessel for any other price than $25,000 as it was or $30,000 if they put it in shape, nor is there any evidence whatsoever to show that defendants intended to warrant anything concerning the boat. Since they had a purchaser who was very much interested in purchasing the vessel for $25,000, as it was, after making a thorough survey and inspection of the vessel, it seems incredible that it could be claimed that they intended to sell the vessel to the plaintiffs for $25,000 guaranteeing that they would pay all expenses of repair over and above $5000.

Incidentally there is no evidence whatsoever that the vessel could not have been satisfactorily operated after repairs amounting to not more than $5000. The vessel had operated satisfactorily during the previous year and up until the time it reached Seattle. Plain-

tiffs never tried to operate the vessel at all. Instead, after doing part of the work to correct the obvious defects which had been pointed out to them, they decided to overhaul the entire motor. While it may be true that the motor was in bad shape from a mechanic's standpoint as testified by Mr. Engstrom there is no testimony at all that the motor would not have continued to operate satisfactorily in the future as it had operated in the past after the one crank pin had been smoothed up and the bow repaired. Certainly it was never contemplated by any of the parties that plaintiffs would proceed to completely overhaul the motor and completely overhaul the rest of the boat and charge it to the defendants as was done in this case.

Remington's Revised Statutes of Washington 5836-69 has to do with the remedies of a buyer for breach of warranty and reads in part as follows:

> "(1) Where there is a breach of warranty by the seller, the buyer may, at his election,
>
> subsection (b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.
>
> (2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.
>
> (6) Measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
>
> (7) In the case of breach of warranty of quality, such loss, in the absence of special circum-

stances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Remington's Revised Statutes of Washington, Section 5836-49, reads as follows:

"In the absence of express or implied agreement of the parties acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale but, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

In this case the buyer took possession of the boat on or about April 2, 1947. A machinist "turned the defective crankshaft within a few days after that date and somewhere between the 15th of April and the 29th of April the plaintiffs knew or should have known the full extent of the claimed damage to the motor and the claimed breach of warranties concerning such motor. Within a few days thereafter they caused the vessel to be put in drydock and certainly at that time they knew the full extent of the damage to the hull. It is almost a certainty that they knew the damage to the hull or had a very good reason to suspect the nature of the damage to the hull before putting the vessel in drydock.

Plaintiffs have claimed that the vessel was warranted to be sound and tight. As a matter of fact everybody knew that it was not sound and tight insofar as the bow was concerned. The damage there was specifically called to the buyer's attention and while it is probable that no one at that time knew the exact extent of the damage all the parties suspected that it would take several thousand dollars to repair that damage. This is borne out by the testimony that Anderson had already had an estimate of $5,000.00 for putting the vessel in running order and that that figure was used in discussing the difference between the price of the sale as the boat stood or the price of the vessel if Anderson caused it to be repaired. Also it appears that anyone making any inspection could see that the bow was splintered under water. While the plaintiff insists that he did not see the damage and that he relied implicitly upon the so-called representations made by the defendants his witness Blanchard admits that he could see the splinters and at least some damage below the water line and defendants' witness Engstrom testified that he personally could see that there was considerable damage below the water line and suggested that an inspection be made of that damage. While there is some testimony that the vessel was taking water in the forward chain locker ahead of the water tight compartment there is no evidence at all that any of that water ever got behind the water tight compartment or that the damage could no have been reasonably repaired within the estimate of $5,000.00. In that connection we should keep in mind that the work

contemplated by the parties to be done to the motor as claimed by appellees amounted to only $300.00 and the bulk of the repairs if defendants had made the repairs would have been to the bow.

Exhibit 13 purports to be a bill rendered by Pacific Electrical and Mechanical Co. for the work done to the hull of the tug in question. This bill states as follows: "To bill you for repairs to the tug Adak (Helen A.). Clean and copper paint bottom. Repair forefoot, stem and keel, renew planks. Do other work as directed." Then follows an itemization of bill for $8,620.43 including a list of miscellaneous material apparently used in repairing the vessel. How much of the bill was used in cleaning and copper painting the bottom of the boat and how much was used in renewing planks in other parts of the vessel not in the bow and how much was used in "doing other work as directed" is left purely to speculation.

In any event from the undisputed evidence defendants remained in Seattle until the 3rd of June of 1947 and apparently their power barge remained tied up at the same dock where plaintiffs took delivery on the tug which is here in question. Apparently had plaintiffs desired to do so there would have been no difficulty whatsoever in contacting the defendants but no such contact was made. Plaintiff proceeded to overhaul the motor and generally to overhaul the hull according to his own inclinations without any notice to the defendants at all and without any attempt to contact them until the letter dated May 17, 1947, written by plaintiffs' attorneys and directed to

appellants. That letter written at least a month after plaintiffs knew or should have known of the alleged breaches of warranty was obviously written for the express purpose of attempting to set up a suit for damages and at the time the letter was written plaintiff without consultations with or notice to the defendants had obligated himself to pay some $20,000.00 to $25,000.00 in connection with the repair and rebuilding of the vessel.

It seems obvious to appellants that the whole purpose of this thing was to purchase a known used boat in damaged condition at the lowest possible price then to proceed to repair the vessel and to completely overhaul the same and then to attempt to get out of paying the price or to recoup the price paid by claiming misrepresentation and breach of warranties without giving the defendants an opportunity to take back the vessel and to sell it as they could have done had they known that plaintiff did not intend to go through with the deal that he had made.

See *Perrine v. Buck,* 156 Pac. 20.

All the way through their case plaintiffs have apparently taken the position that the correct measure of damages in the event of breach of warranty is the amount of money expended by plaintiffs in rehabilitating the vessel. Accordingly they confined their proof on the trial to showing the amounts allegedly paid by plaintiffs in that connection. They did not offer any evidence whatsoever concerning the value of the vessel in its condition as purchased as against the value of the vessel had it been as they claim it

was represented. They are attempting to charge defendants here on the basis of a vessel completely overhauled and in first class condition by charging the defendants with all the costs of overhaul, repair and rehabilitation.

Under the Uniform Sales Law as adopted by the State of Washington, Section 5836-69, as above set forth, the proper measure of damages in case of a breach of warranty of quality is the difference between the value of the goods at time of the delivery to buyer and the value they would have had had they answered to the warranty. The case of *Burnley v. Shinn* decided by the Supreme Court of Washington found at 141 Pac. at page 326, stands for the proposition that in an action for breach of warranty of an automobile no judgment for damages can be rendered without evidence of the market or reasonable value of the machine in contradistinction to the sale price.

See also the following cases:

Abrahamson v. Cummings, 117 Pac. 709, decided by the Supreme Court of the State of Washington;

Fryburg v. Brinck, 12 Pac. (2d) 757, decided by the Supreme Court of the State of Montana;

In re Buswell's Estate, 22 Pac. (2d) 317, decided by the Supreme Court of the State of Oregon; and

Denver Horse Importing Co. v. Schaefer, 147 Pac. 367, decided by the Supreme Court of the State of Colorado,

to the effect that the correct measure of damages for alleged breach of warranty is the difference between the value of the goods as furnished and the value of such goods had they been as warranted.

See also the case of *Fairbanks Steam Shovel v. Holt and Jeffrey,* decided by the Supreme Court of Washington, 140 Pac. 394. That case involved a claim for damages as a result of the breaking of a boom on a dredge. The plaintiffs in that case claimed damages in the amount of the value of the claimed repair of the boom and the trial Court allowed an arbitrary amount less than the cost of repairing the boom and that judgment was affirmed by the Appellate Court. In that case the Court had found that the appellants as sellers had specifically undertaken and guaranteed to put the dredge in a first class condition and held that under such guarantee that the seller was liable for damages for the defective boom even though it had no knowledge of such defective boom. The Court held that the amount paid out in repair does not itself furnish a measure of recovery, citing cases, and held that it was not satisfied that the amount of repairs was a reasonable sum to be charged and adopted the arbitrary finding of the trial judge as to the damages suffered by reason of the breach of warranty.

The Court in its opinion at page 38 of the record quotes sub-section 7 of Section 5836-69 of Remington's Revised Statutes of Washington above mentioned to the effect that the measures of damages to be used in cases of breach of warranty of quality are the differences in value between the goods at the time

of delivery and the value they would have had if they had answered to the warranty, and at page 38 of the record the Court used the following language:

> "Since the defendants sold the tug for $25,000.00 and the plaintiff claims it cost $27,487.97 to restore the vessel to the condition it was warranted to be in, it would appear either that the defendants sold the tug for far less than its value or that the plaintiff had it completely overhauled. I am inclined to believe that much of the work was unnecessary to restore the vessel to the condition it was warranted to be in, for it is incredible that the value of a tug which cost $250,000.00 to build three years before had, because of a ruined motor and damaged bow, wear and tear and perhaps neglect, somehow depreciated to a minus $2,500.00."

Later in the opinion at page 40 of the record appears the following language:

> "I am inclined to believe that from the amount allowed for repairs should be deducted the equivalent of accrued depreciation for three years, the age of the tug, but in the absence of any evidence, no finding can be made on the subject."

From this language it is evident that the Court got into difficulties in attempting to assess damages according to plaintiffs' theory and according to plaintiffs' evidence which was voluminous as to the amount expended supposedly in repairing the vessel, but absolutely silent as to the value of the vessel as it was delivered in contradistinction to the value of the vessel had it been as plaintiffs claimed it was warranted.

Had the correct measure of damages been proved, the Court would not have been bothered either with a belief that much of the repair was unnecessary or with any question of three years' accrued depreciation because both of such matters would have been taken care of by testimony as to the value of the vessel at the time it was sold as against the value of the vessel had it been in the condition which plaintiffs claim it was warranted to be.

It appears to us that if it was evident that the tug had not depreciated to a minus $2500 in value in three years that it is just as evident that it had not depreciated to the extent found by the Court.

The difficulty with plaintiffs' proof and the Court's findings is that the repairs necessarily resulted in a rebuilt or reconditioned vessel which was without question far more valuable than the vessel as it was sold.

Certainly it can't be said from the evidence in this case that the parties contemplated that plaintiffs were to receive a completely overhauled and reconditioned boat with a rebuilt motor for the price of $25,000 plus five thousand dollars in repairs.

Appellants believe that from the foregoing argument it is apparent that no warranties were made and no warranties were breached and that plaintiffs have not shown that they were entitled to any damages at all. However, in the event that the Court should hold that appellants are wrong in their contention, then appellants allege that the only damages

which appellees have proved they suffered as a result of the alleged breach of warranty is the difference between five thousand dollars and the cost of repairing the bow of the boat or approximately three thousand to thirty-five hundred dollars.

Appellants believe that on the state of the record it would be absolutely impossible to find the true cost of such increased repairs by reason of the fact that appellees admittedly did considerable work which was not caused by the alleged breach of warranty. The trial Court attempted to get at this matter by estimating the cost of materials as to cost of labor and deducting the resulting estimate as the cost of copper painting the bottom of the boat which admittedly was not contemplated by the parties. This finding is not based upon any evidence whatsoever and is completely without value for the reason that it fails to take into consideration the fact that there is no evidence to support the inference that copper painting was the only extra work done by appellees in repairing and refurbishing the hull of the boat. On the contrary, it appears clear that the boat was thoroughly cleaned, which probably included removal of barnacles and possibly sandblasting and other work preparatory to painting. It also ignores the fact that the bill is for "other work as directed" and there is no evidence at all to indicate the extent of such other work. There is no evidence whatsoever that the work in repairing the hull over and above the work done in fixing up the bow was of the value set by the Court. Such value is pure speculation.

The same may be said concerning the value of the lifeboat as found by the Court. Appellees in their complaint claim that the lifeboat in question was worth $1000, but unless appellants have overlooked something in the record there is no evidence whatsoever concerning the value of the lifeboat except the testimony of appellants' witnesses to the effect that such lifeboats were selling in Seattle for approximately $300 to $400. The Court arbitrarily allowed the sum of $500 for the value of this lifeboat.

During the course of the examination of Mr. Owens, defendants asked him what he received upon resale of the vessel in question and on objection by Owens' attorney the Court refused to allow him to answer that question on the ground that the sale was too remote to have any bearing upon damages in the case. The question asked of Owens was as to whether he had not sold the boat for $65,000 in the year 1950. If in fact he did sell the boat for $65,000 then it appears that he received back the original cost of the boat, all repairs which he made to the boat, damages for loss of profits allowed by the Court plus a profit of some $6000. In addition he had the use of this valuable boat, which appellees claim would earn about $125 a day net, for a period of some three and one-half years. If the vessel was sold for $65,000 it appears clear that the plaintiffs suffered no damages whatsoever and to allow them damages in the sum of 24,970-odd dollars plus costs or in any other sum cannot be justified.

The Court allowed plaintiffs as damages, the sum of $7920.18 because of alleged loss of profits by reason of delay in use of the boat occasioned by the alleged misrepresentations and breaches of warranty. This allegation of damages is based strictly upon a statement of appellee Owens to the effect that had he had the use of the boat he could have hauled some five million feet of logs at a gross price of $4 per thousand and that his net profit would have been one-half of that amount, or $2 per thousand. No testimony was offered or received at all concerning any breakdown of how such profits could be realized. In fact the testimony was that the tug could have hauled a large portion of such logs, not that it could have hauled all of them. Appellants believe that such testimony was strictly speculation and not the basis for any claim of damages. It seems absolutely unbelievable that a vessel which cost $25,000 and which plaintiffs claim was to be repaired at a cost of not to exceed $5000 could earn a net profit of almost $8000 in a period of sixty-four days, almost $125 per day, day in and day out. At that rate the boat would completely pay for itself including the estimated cost of repair of $5000 in approximately eight months' time.

The Courts of the State of Washington have considered this matter of speculative profits and we wish to call the Court's attention to the case of *Puget Sound Iron and Steel Works v. Clemmons,* 72 Pac. 465. In that case a logging company purchased a donkey engine and then claimed loss of profits because it was claimed there was a breach of warranty

concerning such engine. The lower Court allowed loss of profits as an element of damages. The Appellate Court in reversing the lower Court and in disallowing the speculative loss of profits as an element of damage used the following language:

> "There is no evidence at all in the record tending to show that appellants knew the extent of respondent's operations, the number of logs he was hauling, the number of men or machines he was working or the kind or character of roads the logs were hauled over. These things would certainly have been mentioned at the time of the contract if appellant intended to give a warranty that the engine would do the work which appellant was going to put it to, and in case of failure to be liable for the loss of profits of a large logging camp."

In the case in question there is some evidence that appellee Owens notified appellants that he was operating a logging camp and intended to use the tug in connection with those operations but there is no evidence at all that appellants knew the extent of his operations or anything else about such operations or even that the tug in question was to be used in hauling logs. It seems clear that appellants did not contemplate that they were to be liable in any event for any loss of profits of a large logging operation.

See also *Perrine v. Buck,* 156 Pac. 20, in which the buyers ordered a part for a pump for use in connection with their road building operations in the City of Seattle. The trial Court allowed a judgment for loss of profits. The Appellate Court reversed the

judgment with directions to enter judgment in favor of the plaintiff, who was the seller in that case.

Appellants believe that they have shown that no warranties were made, no warranties were breached and that in any event no damages were proved by appellees and that the trial Court should have rendered judgment for defendants at the close of plaintiffs' case. In the alternative we believe that we have shown that if the Court finds that appellants are liable to appellees in any amount that the judgment as rendered is grossly above any amount to which plaintiffs could possibly be entitled and that in that event the matter should be sent back for a new trial under proper evidence as to measure of damages and that the items for loss of alleged profits should be stricken from the case.

Dated, Anchorage, Alaska,
September 26, 1952.

Respectfully submitted,
DAVIS & RENFREW,
By EDWARD V. DAVIS,
Attorneys for Appellants.

No. 13,313

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co.,

Appellants,

vs.

A. E. OWENS, FERN OWENS, and R. F. OWENS, co-partners, doing business as Owens Brothers,

Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEES.

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IN THE

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vs.

A. E. OWENS, FERN OWENS, and R. F. OWENS, co-partners, doing business as Owens Brothers,

Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEES.

FACTS.

The facts involved in this case are most succinctly set forth in the opinion of the trial court (Tr. 34) and in its Findings of Fact (Tr. 41). Since appellants have relied heavily upon factual issues in their brief, a rather detailed analysis of the evidence will be set forth herein despite the well established rule of law that "In reviewing the sufficiency of the evidence to

sustain the findings, the Appellate Court will give the strongest probative force to the evidence in support thereof and will consider all reasonable inferences to be drawn therefrom, viewing the evidence in the light most favorable to the prevailing party and to the findings made." 5 *C.J.S.,* 409, 410; *Key v. Polk,* 63 F. 2d 358; *Metropolitan Casualty Insurance Co. of N. Y. v. Hoage,* 72 F. 2d 175; *Colby v. Riggs National Bank,* 92 F. 2d 183; *Nygard v. Dickinson,* 97 F. 2d 253.

The appellants purchased the war surplus vessel TP 100 in the spring of 1946 for $10,000.00. (Tr. 311, 315.) In February, 1947, the vessel was run from Alaska to Seattle, Washington, for the purpose of having it repaired, but on the way south, it ran into a rock and had to be backed off. This collision resulted in the complete demolition of the forefoot, substantial damage to the lower portion of the stem, broken planks, and substantial damage to the keel. In addition, the stem iron was almost torn loose. (Tr. 199, 200, 96, 97, and Exhibits 7 and 8.) The damage was below the water line and while the forward portion of the vessel was open to the sea, a water tight bulkhead prevented the water from pouring into the remainder of the vessel.

After this accident, appellants decided to sell the vessel rather than repair it. Mr. A. E. Owens, one of the appellees, was in Seattle, Washington, at the time and was interested in procuring a tugboat for use in connection with his logging operations in Alaska. Upon ascertaining that the appellants wished to sell their

vessel, Mr. Owens contacted them and was shown the vessel. The appellants were informed that he wished to secure a vessel for use in connection with his logging operations. (Tr. 16, 116, 407.) Mr. Owens was shown the boat and made a cursory inspection of it. The appellants represented to him that the vessel was in good condition except for one scored crankpin, also referred to as a scored bearing or journal (Tr. 17, 74, 244, 297, 298, 319) and a bruised forefoot. The appellants also made the affirmation of fact that the vessel had struck a log on the way south which was the alleged cause of the "bruised forefoot". (Tr. 31, 74, 414, 415.) Appellants also told Mr. Owens that the vessel was not leaking (Tr. 74, 244, 414) and that an expenditure of $5000.00 would put the vessel in good condition. (Tr. 17, 74, 297.) This last representation was in effect admitted by the pleadings wherein appellants admitted "* * * that an allowance of $5000.00 was made to plaintiffs by defendants on the purchase price of the vessel by reason of the defects noted in defendants' answer." (Tr. 11.)

Relying on these representations, Mr. Owens agreed to purchase the vessel on behalf of the appellees for a full purchase price of $25,000.00. Since appellants had not yet received a bill of sale for the vessel, a written agreement was entered into for the purpose of providing for immediate transfer of possession of the vessel pending receipt of a bill of sale from the army which was prerequisite to documentation. This agreement (Tr. 78-82) makes no reference to the condition of the vessel.

Shortly after April 1, Mr. Owens was given possession of the vessel which was moved for him by the appellants to another dock. At the time that Mr. Owens had been shown the vessel by the appellants, it was not possible to see more than six inches below the water line so that the extensive damage to the bow could not be detected. One piston had been removed from the cylinder and was made fast to the motor block, but no detailed inspection of the engine was made by Mr. Owens.

Mr. Owens arranged to have the repairs made which appellants' representations had indicated would be necessary to the vessel. An inspection of the engine was made by Ted Engstrom, a mechanical expert of the Fairbanks-Morse Company, whose deposition was introduced into evidence in the case. Instead of the damage being restricted to one scored crankpin, Mr. Engstrom discovered that all main bearings were either completely wiped out or the babbitt was cracked with pieces missing; all main bearing journals were scored and approximately ⅛" under the original shaft diameter. The water pump was plugged. Teeth were missing from the drive gear and the gear was beyond further use. The fresh and salt water pumps' shafts were bent and the bearings were beyond further use. The crankshaft itself was distorted 3/64ths of an inch, being warped so as to be unusable. The oil columns were packed solid with babbitt the full length, and the lower base of the engine, due to intensive heat, had been warped. (Tr. 433, 434.) This damage to the engine was only determined after the engine was torn

down and could not have been detected by casual inspection such as that made by Mr. Owens.

The full extent of the damage to the engine was not ascertained until the crankshaft had been removed and placed on a lathe. As soon as the crankshaft was removed sometime in May of 1951, the vessel was removed to a dry dock, at which time the substantial demolishment of the bow was first ascertained. On May 17, very shortly after the nature of the damage to the vessel had been ascertained, Mr. Owens had his attorney write to the appellants notifying them of the substantial damage to the vessel, and further of the fact that the vessel had been misrepresented to Mr. Owens, who was looking to the appellants for the damages caused by the misrepresentations. (Tr. 348-350.) Prior to the time that the substantial damage to the vessel was ascertained, the down payment of $5000.00 had been submitted to appellants and appellees had made a note and mortgage with the First National Bank of Anchorage for the balance of the purchase price. (Tr. 412, 413.)

At the time that the vessel was purchased, Mr. Owens agreed to loan to the appellants an 18 ft. steel lifeboat which appellants agreed that, while on their way to Seldovia, Alaska, they would return to appellees at their logging camp near Ketchikan, Alaska. This lifeboat was never returned and no answer was ever made to appellees' demand for its return. (Tr. 342, 354.) The court found the value of the lifeboat to be $500.00, and testimony in regard to its value varied from $300.00 to $400.00 (Tr. 281, 282) to $1000.00. (Tr. 119.)

Itemized bills in regard to the cost of repair of the vessel were submitted as follows:

Wilson Machine Works, smoothing bearing		$ 300.00
Fairbanks-Morse & Company for new crank shaft and insurance		6,056.66
Fairbanks-Morse & Company for work on engine		6,085.19
Diesel Engineering Co., tail shaft and stuffing box		1,222.04
Canal Electric Co., repairing batteries		632.42
Pacific Electric & Machine Co., repairing forefoot, stem, keel and planks		8,390.03
Board for Owens' employees while working on repairs of vessel		700.00
Employees of Owens Brothers for work done on vessel:		
Blanchard	$1,400.00	
Moore	232.57	
Moore	222.45	
Tucker	292.90	
Tucker	289.50	
W. E. Eaton	219.26	
W. E. Eaton	245.20	
Jacobsen	92.45	
Jacobsen	172.50	
Total wages		3,166.83
Four trips of A. E. Owens from Alaska to Seattle in connection with repairs necessitated by misrepresentations		934.80
TOTAL		$27,487.97

The court found that $21,798.68 was necessarily expended in order to repair the vessel to the warranted condition and so that it would be usable for the purposes of Mr. Owens' business. The court refused to allow the amounts expended for a new tail shaft, stuffing box, battery plates, copper painting the vessel, and the work performed by Mr. Owens' employees, other than Mr. Blanchard. Since both parties admitted that appellants represented that the cost of repairing the damage to the vessel would be $5,000.00, this sum was deducted from the sum of $21,798.68, the court finding that the excess cost of repairs due to the misrepresentations of the appellants was $16,798.68. In addition, due to the substantial damage to the vessel, it took 105 days to repair it so that it would be in working condition. This was approximately 75 days longer than it would have been necessary to take in repairing the vessel had it been in the condition warranted, and Mr. Owens testified that, had he been able to use the vessel, he would have been able to have towed five and a half million feet of logs, for which he would have received the sum of $4.00 a thousand. Approximately 50% of that sum would have been profit, had he been able to use the vessel, amounting to $11,000.00. (Tr. 116, 117.) The court reduced this figure for loss of profit to the sum of $7,920.18, after reducing the delay period by the time estimated by the court to be spent on general overhaul, in addition to that necessary to place the vessel in the condition warranted, and after further reducing the delay period by the ten days spent in making a trip to San Francisco to pick up a barge and tow it to Alaska.

ARGUMENT.

I.

THERE WAS AN IMPLIED WARRANTY THAT THE VESSEL WAS FIT FOR USE BY APPELLEES IN THEIR LOGGING BUSINESS, WHICH WARRANTY WAS BREACHED.

Since the sale of the vessel involved in the subject appeal was consummated in the State of Washington, it is agreed that the substantive law of the State of Washington applies. Washington, like Alaska, has adopted the Uniform Sales Act which provides in part as follows:

> "*Implied warranties or conditions as to quality or fitness.* Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract, to sell or a sale, except as follows:
>
> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose * * *" Remington Revised Statutes, Section 5836-15.

As indicated in the statement of the facts, and as found by the District Court, appellants were notified of the purpose for which the appellee required the vessel. Consequently, there was an implied warranty that the vessel, with the exception specified, was fit to be used in the logging business. Mr. A. E. Owens testified (Tr. 116):

"Q. Did you inform Mr. Anderson when you originally negotiated the purchase of the vessel just what you wanted the vessel for?

A. That is right.

Q. What did you tell him in that regard?

A. That we were logging and wanted it to tow logs."

Similarly, Orville H. Mills stated in his deposition (Tr. 407):

"A. Mr. Owens, after introducing Mr. Anderson, outlined that Mr. Anderson had an Army Tug passenger ship for sale; that Mr. Anderson had shown the vessel to Mr. Owens; that Mr. Owens was in the market looking for a tug in connection with his logging operations out at Ketchikan, Alaska, for particular duty in connection with towing rafts of logs from his logging operations in the waters of Alaska to mills, I believe, around Juneau, and that in that connection he had looked at Mr. Anderson's vessel."

Due to latent defects in the engine, and due to the hidden condition of the bow of the vessel, this implied warranty of fitness was breached and appellees were entitled to the damages directly flowing from that breach.

Appellants, in their brief, have cited some cases not decided under the Uniform Sales Act where it was held that there is no implied warranty of fitness in regard to the sale of used property. *Perine Machinery Co. v. Buck,* 156 Pac. 20, appellant's brief 49-57; *Smith v. Bolster,* 125 Pac. 1022, appellant's brief 41.

The section quoted above, however, from the Uniform Sales Act has done away with the distinction made in a number of old cases between new and used property. The case of *Tremoli v. Austin Trailer Equipment Co.,* 227 P. 2d 923, 102 Cal. App. 2d 464, holds that under the Uniform Sales Act, an implied warranty of the fitness of goods for the purpose for which purchased extends to latent defects even though the seller is not the manufacturer. In referring to the Uniform Sales Act, the Kentucky Court of Appeals stated in a recent decision:

> "To exclude secondhand goods would be the insertion by the court of an exception from the all-coverage language of the statute itself. We therefore conclude that the statute permits the implication of an implied warranty when the facts exist, or testimony establishing such facts is introduced upon which the statute permits the creation of an implied warranty." *Moss v. Yount,* 296 Ky. 415, 177 S.W. 2d 372. See also *E. Edelman & Co. v. Queen Stove Works,* 205 Minn. 7, 284 N.W. 838; *McKeage Machinery Co. v. Osborne & S. Machinery Co.,* 124 Pa. Sup. Ct. 387, 188 A. 543; *Weber Iron & Steel Co. v. Wright,* 14 Tenn. App. 151; *Durbin v. Durbin,* 106 Or. 39, 210 P. 165; *W. F. Dollen & Sons v. Carl R. Miller Tractor Co.,* 214 Iowa 774, 241 N.W. 307; *O. S. Stapley Co. v. Newby,* 57 Ariz. 24, 110 P. 2d 547; *Drumar Mining Co. v. Morris Ravine Min. Co.,* 33 Cal. App. 2d 492, 92 P. 2d 424.

As long as a written agreement does not specifically negate an implied warranty, parol evidence of the

circumstances giving rise to the warranty is admissible. *Hobart Mfg. Co. v. Rodziewicz,* 189 A. 580; *Mayer Lifeboat Co. v. Isaacson Co. Iron Works,* 212 P. 1054, 123 Wash. 566; *McDonald v. Sanders,* 137 So. 122, 103 Fla. 93. The only writing involved in the subject case was the agreement to take care of the interim period prior to the receipt of a bill of sale for the vessel, which agreement makes no reference whatsoever to the condition of the vessel.

Based on the well accepted rule that the findings of fact of a trial court will be reviewed in the light most favorable to the prevailing party, and to the findings made, it would appear beyond dispute that there was an implied warranty as to the fitness of the vessel and that this implied warranty was breached to the damage of the appellees.

II.

EXPRESS WARRANTIES WERE MADE BY APPELLANTS WHICH WARRANTIES APPELLANTS KNEW OR SHOULD HAVE KNOWN WERE UNTRUE.

Appellants, in their brief, contend that no express warranties were made in regard to the sale of the vessel. They state that "the only evidence on behalf of the plaintiffs as to the alleged misrepresentations or warranties was given by the plaintiff A. E. Owens and by Howard A. Dent, apparently a former business associate of plaintiff". (Appellants' Brief 21.) This ignores the testimony contained in the deposition of Orville A. Mills. (Tr. 414.) The trial court was en-

titled to believe the testimony of Mr. Owens, alone, and under the well established rule on review that the court's findings "will be presumed to be supported by the evidence, which will be viewed in the light most favorable to them" (5 *C.J.S.* 408), there can be no doubt but that express warranties were proved. Moreover, there was really no dispute under any of the evidence as to the giving of these warranties as the essential facts were, in almost every instance, admitted by the appellants or witnesses on their behalf. The applicable statute in regard to express warranties is Remington's Revised Statutes of Washington, § 5836-12, as follows:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

Appellants warranted that the vessel was in good condition except for one scored crankpin, also referred to as a scored bearing or journal, and a slightly bruised forefoot.

In addition to the testimony of Mr. Owens, Mr. Dent and Mr. Mills referred to above, this warranty was admitted by appellants. Mr. Jack C. Anderson, Sr., admitted the following conversation with Mr. Owens:

"I said 'In fair shape with the exception it has got a damaged forefoot and a burnt'—I am trying to think of the name—'journal or crankshaft journal. We had a little difficulty with that and we are anticipating fixing it'." (Tr. 297-298); and

"I told him like this. 'The boat is in a fair condition with the exception of a damaged forefoot and a crankshaft journal, scored crankshaft journal.'" (Tr. 319); and

"Q. And as far as you knew, it was all right except for one crankshaft bearing and for a bruised forefoot; is that right?

A. Damaged forefoot; yes.

Q. And that is what you told Mr. Owens, isn't it?

A. That is right.

Q. And that it was in good condition otherwise?

A. I never made that statement.

Q. You said fair condition?

A. Fair condition." (Tr. 321-322); and

"Q. * * * How much money did you figure it would cost you to put this back in good shape?

A. About five thousand dollars." (Tr. 296-297.)

Appellants' witness George Henry Saindon testified as follows:

"Q. Now did you hear Mr. Anderson tell Mr. Owens that, aside from the one bearing the engine was in good condition?

A. Yes, I did." (Tr. 244.)

The actual condition of the engine was given by the impartial expert witness, Ted Engstrom, who stated that all main bearings were either completely wiped out or the babbitt was cracked with pieces missing. All main bearing journals were scored and approximately one-eighth inch under the original shaft diameter. The water pump was plugged, and the water pump shafts for both the fresh and salt water pumps were bent and the bearings beyond further use. The drive gear had teeth missing and was beyond further use. The crankshaft itself was distorted 3/64ths of an inch. The oil columns through the main bearing webs were packed solid with babbitt the full length, causing total restriction, and the lower base of the engine had been warped considerably due to intensive heat.

The vessel was warranted in good condition aside from the one scored crankpin and a bruised forefoot. A cursory glance at Exhibits 7 and 8 filed with this learned court will reveal the extent of the falsity of this representation. The forefoot was completely demolished, the lower portion of the stem substantially damaged, planks broken, the stem iron almost torn loose and the keel badly damaged. This damage was all below the water line and could not be seen at the time Mr. Owens was shown the boat. (See testimony of Appellants' witness David Eldon Erickson (Tr. 461).)

Moreover, in order to prevent Mr. Owens from becoming suspicious as to the real nature of the damage, the appellants falsely stated that the cause of

the "bruised forefoot" was the striking of a log on the way to Seattle. It is highly significant that, despite the extensive evidence in regard to this affirmation of fact, appellants never denied telling Mr. Owens that the "bruised forefoot" was caused by striking the log. Actually, the evidence indicated that the vessel had run into a rock and had to be backed off. The trial court found:

> "It was proved that instead of striking a log, which would have caused relatively little damage to a tug of this size, the tug had struck a rock, and from the photographs of the bow, plaintiffs' exhibits Nos. 9 and 19, I am convinced that so much damage could not have resulted unless the vessel struck at full speed. The testimony of the defendant Anderson as to this incident was such as to seriously affect his credibility." (Tr. 36.)

It was only after extended cross-examination that Mr. Anderson admitted that the vessel had struck a rock as he apparently wished to justify his warranty to the effect that it had struck a log which of course, if true, would indicate slight damage only. In view of the fact that appellants originally proceeded to Seattle with the intention of repairing the vessel and, after striking the rock, changed their minds and decided to sell it, the evidence in regard to this incident goes further than a mere breach of warranty but indicates the actual perpetration of fraud upon the appellees. The allegation in regard to the striking of a log was a deliberate false statement, obviously made for the purpose of misleading appellees.

Moreover, appellants warranted that the vessel was not leaking. In addition to the testimony of appellants' witnesses, this warranty, as in almost each of the others, was admitted by witnesses of the appellee. Thus appellants' witness Saindon testified:

> "Q. Now, did you hear Mr. Anderson tell Mr. Owens that, aside from that one bearing, the engine was in good condition?
>
> A. Yes, I did.
>
> Q. And did you hear him tell him that the vessel wasn't leaking?
>
> A. Yes, I did." (Tr. 244.)

An inspection of the pictures of the bow of the vessel show that it must have been leaking as stated in the testimony of Mr. Blanchard and Mr. Owens; and the trial court so found. Again it is inconceivable that the appellants did not know that the portion of the vessel forward of the watertight bulkhead was freely taking water from the gaping hole created by running into the rock, although this could not be detected by one making a casual inspection of the vessel.

The final warranty was in regard to the amount of money that would be necessary to repair the vessel. All the evidence was to the effect that $5,000.00 would be adequate. This was even in effect admitted in the pleadings wherein appellants stated in answer to the complaint:

> "Defendants admit that an allowance of five thousand dollars ($5,000.00) was made to plaintiffs by defendants on the purchase price of the vessel by reason of the defects noted in plaintiffs' complaint." (Tr. 11.)

The actual costs of repair were shown to be $27,-487.97, of which sum the trial court found $21,798.68 was required to bring the vessel to the condition warranted.

In the face of this overwhelming evidence of affirmations of fact, appellants seek to have the trial court's findings overruled on the basis that the statements were mere expressions of opinion or seller's praise. When the specific warranties are kept in mind, it is clear that they each constituted an affirmation of fact and promise.

Appellants rely heavily on one case, that of *Getty, et al. v. Jett Ross Mines, Inc.,* 159 Pac. 2d 379. The statement as to the condition of the motor in that case was to the effect that it needed to be repaired. This is quite different from a statement to the effect that it was in first class condition with the exception of the one crankpin. Moreover, in the *Getty* case, "the dragline was shown in the open, under no camouflage whatsoever"; in marked contrast to the subject case where the motor was not torn down so that the parts could be inspected, and the damage to the bow was completely hidden by the water.

Numerous cases hold that statements such as those made in the subject case constitute warranties. In fact, much more general statements have been sustained as the basis for recovery in suits for breach of warranty. Thus, in the case of *Harrigan v. Advance Thresher Co.,* 81 S.W. 261, 26 Ky. 317, a statement that an enginne was "all right, in good condition"

was held to constitute an express warranty. Similarly, where a secondhand ruling machine was sold and the seller stated that it was in good order, the buyer was allowed to recover for breach of warranty when defects were discovered. *Latham v. Shipley,* 86 Iowa 543, 53 N.W. 342. In *French v. Hardin County Canning Co.,* 67 Ill. App., p. 269, the statement "understand, we quote you only as cans that are well made, tested and in every way satisfactory for your work", was held to constitute a warranty. In the case of *Curby v. Masterbrook,* 288 Mich. 676, 286 N.W. 123, a sale was made of an automobile "as is". The court held:

> "We hold only that a dealer cannot represent a car to be in 'perfect condition' where he does not have the knowledge of the condition which he professes, without assuming the risk of injuries proximately caused by such misrepresentation. Such decision requires only that if a dealer sells used cars 'as is', he should not tell his customers that they are without defects."

In *Saunders v. Cowl,* 277 N.W. 12, the statement that a tent was "in good condition" was held to constitute a warranty and, similarly, in *Boos v. Claude,* 69 S.D. 254, 9 N.W. 2d 262, a statement that a car was in "perfect condition" was made the basis for recovery by the buyer on a suit for breach of warranty.

The cases of *Smith v. Bolster,* 125 P. 1022, and *Lent v. McIntosh,* 186 P. 2d 626, cited by appellants hardly appear pertinent. The *Smith* case was decided long before the Uniform Sales Act was adopted in the

State of Washington and, consequently, has been changed by the statutory enactment in regard to express warranties quoted supra. Moreover, the case as cited does not indicate what defective conditions were present so that it may not be compared with the subject situation.

Lent v. McIntosh, a more modern case, is readily distinguishable from the case at bar as the agreement in the *Lent* case expressly provided:

> "Purchaser agrees that he has examined the property here described and is using his own judgment as to its condition, fitness and value, that the seller makes no representation, statement, warranty or guaranty as to its condition, or with reference to said property; that the execution of this contract is not procured by any statement, representation or agreement not herein contained, and that each and every condition and agreement relative to the subject matter of this contract is contained herein."

It is thus apparent that five express warranties were made in the subject case, namely:

1. That the vessel was in good condition except for one scored crankpin, also referred to as a scored bearing or journal; and

2. A slightly bruised forefoot;

3. That the forefoot was bruised as aforesaid by striking a log on the trip from Alaska to Seattle;

4. That the vessel was not leaking; and

5. That an expenditure of $5,000.00 would put the vessel in good condition.

All of these warranties were proved to be false and, moreover, in regard to all of them, there is good reason to believe that appellants knew they were false when made.

III.

APPELLEES PURCHASED THE VESSEL IN RELIANCE ON THE REPRESENTATIONS OF APPELLANTS, WHICH REPRESENTATIONS HAD THE NATURAL TENDENCY TO INDUCE APPELLEES TO PURCHASE THE VESSEL.

In his opinion, the learned trial judge stated:

> "I find that the tug was not sold 'as is' but upon the express warranty that it was tight and in fit condition with the exceptions noted; and that this warranty was made with the intent that the plaintiffs should rely, and that plaintiffs bought the tug in reliance, thereon. I also find that although Owens examined the vessel, it was not, nor could it have been, such an 'examination as ought to have revealed' (Sec. 15 (3) Uniform Sales Act), the internal defects in the motor and the under water damage to the hull." (Tr. 39.)

Misrepresentations such as those made by the appellants discussed above could not but have a natural tendency to induce a buyer to purchase the vessel. These misrepresentations go to the very essence of the condition of the vessel. They were made in regard to conditions not readily apparent. The condition of the engine could only be determined by taking it apart (Tr. 142, 114, 115.) Also, Mr. Mills testified that just until the vessel was placed in dry dock.

Mr. Owens testified that the reason that he purchased the vessel was because of these representations. (Tr. 142, 114, 115.) Also, Mr. Mills testified that just prior to the consummation of the sale,

> "I inquired of Mr. Owens whether he had fully inspected the vessel, or had any competent marine engineers inspect it. He informed me that he had not, and he engaged in some side conversation with Mr. Anderson with reference to the vessel, the only portion of which I noted being an assurance by Mr. Anderson that the vessel was as represented, and that they could proceed to close the transaction at that time." (Tr. 410.)

It is true that Mr. Oaksmith, a witness for appellants, testified that in the month of March he spoke to Mr. Owens and attempted to persuade him to purchase another similar vessel for $35,000.00, and that he mentioned to Mr. Owens that there had been trouble with the crankshaft of the TP 100. He specifically mentioned that the vessel had a burned out bearing. Aside from the fact that any such statement from one attempting to sell another vessel would naturally be regarded as merely an effort to run down a rival's ship, the only statement of fact was the very one which the Andersons had previously told Mr. Owens; namely, that there was trouble with one bearing. (Tr. 273.) It is little wonder that such a conversation had no effect in altering Mr. Owens' plans to purchase the boat on the basis of the appellants' representations, and was not remembered four years later.

It is further significant that this conversation in no way put Mr. Owens on warning as to the bow of the vessel or in regard to the other substantial defects. It is extremely common for a competitor to run down a rival's product, and naturally Mr. Owens placed little significance on this conversation, especially in view of the fact that he had been apprised by the appellants of the one defective bearing.

The appellants apparently contend he was motivated in buying the ship entirely by its price. Certainly, however, if the vessel were not misrepresented so as to induce him to purchase it, he would not have paid $25,000.00 for it and then incurred an additional $27,487.97 in repairs, almost all of which would have had to be paid prior to using the vessel; when a similar ship without those defects could have been obtained for $35,000.00. (Tr. 273.) This would be especially true if the amount or manner of paying the purchase price were the prime considerations. It is well known that shipyards will not readily release vessels after repairing them unless payment is made. The checks introduced in evidence further indicate that the payments had to be made prior to release of the vessel.

There can be no doubt but that the sale was induced by reliance upon the gross misrepresentations of the defendants.

IV.

ORAL EVIDENCE IN REGARD TO THE EXPRESS WARRANTIES MADE BY APPELLANTS WAS PROPERLY ADMITTED.

Appellants now contend that oral evidence in regard to the express warranties referred to in this brief was inadmissible. No objection was made at the time that this evidence was introduced and, in fact, much of the evidence was adduced from appellants' own witnesses. A casual reference to the parol evidence rule was included in appellants' motion for judgment at the conclusion of appellees' direct evidence, but no motion was ever made to strike this evidence and objection was not taken to its introduction.

> "As a general rule, unless the evidence has been rendered absolutely inadmissible by statute, or it is of such character that its ill effects could under no circumstances have been obviated in the court below, the admission of evidence which has not been properly objected to in the trial court will not be reviewed, although due exception has been taken." 4 *C.J.S.* p. 561. See cases cited 4 *C.J.S.,* p. 566, Note 65.

The above stated general rule is the law in the State of Washington, *Miller v. Sheane, et al.* (Sup. Court of Washington), 206 P. 913, 120 Wash. 227.

Regardless of the fact that no objection was taken to the introduction of this evidence, nor was any motion made to strike it, the evidence was admissible under the circumstances involved. The trial court found:

> "The agreement was executed on April 1, but the agreement not only does not even refer to the condition of the tug, but its purpose apparently was to provide for immediate transfer of possession pending receipt of a bill of sale from the army, which was a prerequisite to documentation." (Tr. 35.)

It was not intended to be a complete statement of all the agreements between the parties. This is made additionally clear by the fact that the agreement makes no mention of the circumstance that the estimate for repairing the vessel was $5,000.00, although this circumstance is set forth in the appellants' answer to the complaint. (Tr. 11.) Appellants contend that the written agreement should be construed against appellees since it was prepared by an attorney for the appellees. The case cited in that connection, *White v. Eagleson,* 193 F. 2d 567, concerns a situation involving patent ambiguities in a written instrument prepared by one of the parties. The court held that such an ambiguity would be resolved against the party preparing the instrument. In the subject case, there is no ambiguity involved. The terms of the written agreement are clear and not in dispute. The agreement, however, does not purport to be the complete understanding between the parties. No reference to warranties is made therein and oral evidence is permissible under those circumstances. Moreover, the evidence indicates that the contract was examined by attorneys on behalf of the appellants. (See Tr. 424-425.)

Were it not for the oral testimony in regard to the $5,000.00 allowance for repairs, this item would not be deductible in determining the damages of the appellees due to the breach of the implied warranty of fitness of the vessel.

Appellants cite two cases in support of their contention that the express warranties were inadmissible under the parol evidence rule and, in addition, appellants quote from Vol. 20, Amer. Juris. at p. 958, in regard to the general principle that where there is a complete contract, prior parol agreements are merged in the written agreement. This same work, however, states in Section 1135:

> "A well settled exception to the parol evidence rule exists where the entire agreement has not been reduced to writing—that is, where there is what a learned writer in the law of evidence calls 'a partial integration'. In such a case, to prove the part not reduced to writing is admissible, although it is not admissible as to the part reduced to writing."

To the same effect, it is stated in 32 *C.J.S.*, p. 998, that:

> "In accordance with the rules stated supra, 997-1002, as to the admissibility of parol evidence of a collateral undertaking not in conflict with a writing which it is apparent does not cover the entire transaction or define the obligations of both parties, evidence of a parol prior or contemporaneous agreement connected with a sale of personalty may be admissible. Thus evidence has been admitted to show * * * that there was

an oral warranty with respect to the articles sold."

In the case of *Titan Truck Co. v. Richardson,* 210 P. 790, 122 Wash. 452, the Supreme Court of Washington held that oral evidence of an express warranty was admissible despite a written conditional sales contract setting forth all the terms of payment and reservation of title, stating:

"The contract of sale was given to complete the contract between the parties and did not purport to, and did not, contain any of the terms of the sale except those provisions as to the payment of the notes and the reservation of title, and any evidence introduced as to an express warranty upon which the sale was made was in no wise a variance of the terms of the conditional contract of sale. * * * 'Without going into extended reasons, I am rather of the opinion that the contract offered in evidence (being the conditional contract of sale) and relied upon is a contract simply for the payment of money that is due rather than a contract of sale.' In other words, this written contract is principally a memorandum of the terms of payment and was not such a written contract as those referred to in the cases relied on by the appellant, and to which we have just above referred." See also *H. E. Gleason v. Carman,* 187 P. 329, 109 Wash. 536; *B. F. Goodrich Co. v. Hughes,* 194 So. 842, 239 Ala. 373; *Rosenburg v. Capital Cut Stone & Granite Co.,* 238 P. 330, 28 Ariz. 505; *Linograph Co. v. Bost,* 24 S.W. 2d 321, 180 Ark. 1116; *Walnut Creek Milling Co. v. Smith Bros. Co.,* 174 S.E. 255, 49 Ga. App. 116; *Sorensen v. Webb,* 214

P. 749, 37 Idaho 13; *National Cash Register Co. v. Foerster,* 16 N.E. 2d 160, 296 Ill. App. 640; *Stewart v. Clay,* 123 So. 158, 10 La. App. 727; *Edgerton v. Johnson,* 7 S.E. 2d 535, 217 N.C. 314; *Continental Fibre Co. v. B. F. Sturtevant Co.,* 116 A. 533, 273 Pa. 30; *Yancey v. Southern Wholesale Lumber Co.,* 131 S.E. 32, 133 S.C. 369.

In the case of *V. Valente, Inc. v. Mascitti,* 295 N.Y. Supp. 330, a radio was sold upon the representation "You can get any station in Rome and clear." Thereafter, a formal written contract was entered into which contained no warranties. The court laid down the following criteria in determining whether oral testimony is admissible in regard to express warranties in the absence of any mention of warranties in a written contract:

> "Upon the sale of personal property evidenced by a written agreement, complete on its face, an oral warranty as to the subject-matter of the sale may be shown by parol, where: (1) The written agreement, by its terms, does not state or clearly imply that it contains the whole contract; (2) the oral warranty does not change or contradict the terms expressed, as where, though not necessarily, the writing contains the obligations of but one party to the sale, e.g., the seller; and (3) the entire agreement was reached orally before the writing was signed and but a part thereof was incorporated in the writing."

All of the contentions set forth above are to be found in the subject case and clearly the oral testimony was admissible.

The two cases cited by appellants in objection to this general rule are not at all applicable. *Fairbanks Steamshovel Co. v. Holt & Jeffery,* 140 P. 394, involved a written contract including an express warranty that a certain steamshovel was "in first class shape". The court held that there was a breach of this warranty but refused to permit oral testimony as to other express warranties since the contract quite obviously included in its express terms a provision in regard to warranties. The other case cited by appellants is that of *Garrett v. Ellison,* 72 P. 2d 449, wherein the court permitted oral testimony to show that one named in a note as one of the payees had no beneficial interest in the note and mortgage. The court continued with some dictum in regard to the fact that parol evidence is inadmissible to contradict the terms of a written instrument. We fail to see where the case is in point.

The oral evidence of the express warranties was admissible not only in regard to the breach of the warranties but on the basis of showing fraud. There are eight essential elements of actionable fraud (37 *C.J.S.* 215), all of which have been proved in the subject case. Thus the evidence indicates that (1) there were representations made by the appellants; (2) the representations were false; (3) the representations were material; (4) the appellants knew of the falsity of the representations; (5) they intended that the representations should be acted upon by the appellees; (6) Mr. Owens was ignorant of the falsity of the representations; (7) he relied on the truth of ap-

pellants' representations; and (8) he had a right to rely thereon.

Oral evidence is always admissible to prove fraud in the inducement of a contract.

> "Parol evidence is admissible to show that a written instrument was induced by fraud, even though the writing recites that all agreements between the parties are contained therein or provides that no verbal agreements or representations affecting its validity will be recognized; * * *" 32 *C.J.S.* 942.

This principle of law was upheld by the Supreme Court of Washington in the case of *Producers' Grocery Co. v. Blackwell Motor Co.,* 212 P. 154, wherein oral evidence was permitted despite a contract expressly stating that the seller would not be bound by any representations not contained therein. A car was sold upon the oral representation that it was a 1920 model which had been run 4,000 miles when in fact it was a 1919 model which had been run 10,000 miles.

Similarly, in *Marion S.S. Co. v. Aukamp,* 172 Wash. 455, 20 P. 2d 851, the Supreme Court of Washington upheld the introduction of oral testimony to the effect that the seller represented that a used steamshovel "would work just as well as a new shovel" and that it had been thoroughly overhauled. Subsequently, a written contract of sale was entered into, but nevertheless it was held that the buyer could proceed on the basis of the oral representations either in an action for damages or suit to rescind the contract.

Similarly, in the case of *Champlin v. Transport Motor Co.* decided by the Supreme Court of Washington and reported in 33 P. 2d 82, oral evidence as to false representations made to induce the purchase of a car were held admissible despite a written contract of sale stating: "No warranties, representations or agreements have been made by the seller unless specifically set forth herein." The purchaser was awarded damages based on the false representations.

Thus, in the case at bar, the oral evidence as to the express warranties was admitted into evidence without objection and without any motion to strike ever having been made; it did not contradict the written contract which was not a complete agreement; and, further, was admissible to prove the fraudulent representations pleaded in appellees' complaint.

V.

PROMPT NOTIFICATION WAS GIVEN TO THE APPELLANTS OF THE BREACHES OF WARRANTY UPON THE DISCOVERY OF THEM.

The evidence indicates that the vessel after its purchase in the first of April, was removed to the Stikine Fish Company dock. Thereafter, work was commenced on the defective bearing. Subsequently, further investigation revealed additional damage to the engine and it was deemed necessary to remove the crankshaft. It was not until this crankshaft had been removed and placed on a lathe by the Fairbanks-

Morse & Company that the fact that it was unusable, and the extensive damage to the vessel, became apparent. This, as well as the removal of the vessel to dry dock where the damage to the bow of the vessel was ascertained, took place in May. Mr. Owens, who was at his logging camp in Alaska, was called to Seattle when this extensive damage was ascertained and his attorneys, at his request, wrote to the appellants informing them of the discoveries made by Mr. Owens and of the various misrepresentations made in regard to the sale of the vessel. See letter of May 17, 1947. (Tr. 348.) It is further significant that the $5,000.00 down payment had been made to the appellants on April 22, 1947, prior to the discovery of the extensive damage and that the appellees had become obligated on a promissory note and mortgage to the First National Bank of Anchorage for the balance of the purchase price.

The case of *Suryan v. Lake Washington Shipyards* decided by the Supreme Court of Washington June 22, 1931, 300 P. 941, is quite similar to the case at bar. The plaintiff purchased a vessel from the defendant. While fishing in Alaskan waters on June 12, 1928, a leakage developed and the boat was towed into port where temporary repairs were made. "On August 14, 1928, while fishing was still in progress, the plaintiff, in answer to a request for payment on account of the balance due for the construction of the boat, sent a telegram which reads as follows: 'Sorry can not help out now Fishing very poor Hardly making expenses Stop Do not think addi-

tional charges fair as part of stern of boat was not caulked and we almost lost boat and lives with a load.' " After the fishing season closed, a survey was made of the vessel and, on October 20, 1928, for the first time, demand was made upon the defendant for damages due to the breach of the implied warranty of seaworthiness. The court held that the telegram of August 14th, together with the letter of October 20, constituted timely notice under the provisions of the *Uniform Sales Act,* Sec. 5836-49, Rem. 1927 Supp., providing:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

It is to be noted that, in the *Suryan* case, the first notice of a claim for damages was made on October 20th, over four months after the damage was ascertained, and the initial telegram was more than a month after the leakage occurred. By contrast, the notice given in the subject case was extremely prompt and certainly complies with the statutory requirements.

VI.

THE LEARNED TRIAL COURT CORRECTLY APPLIED THE LAW IN DETERMINING THE AMOUNT OF DAMAGES.

Appellants contend that the court erred indetermining the amount of damages awarded to appellees for the false representations made by appellants. Section 5836-69 of *Remington Revised Statutes of the State of Washington* provides:

> "(6) Measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
>
> (7) In the case of breach of warranty, of quality, such loss, in the absence of special circumstances showing proximated damage of a greater amount is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty."

The trial court used this exact basis in determining the damages to be awarded to the appellees. It determined the reasonable cost of the repairs necessarily expended in restoring the vessel to a fair condition, and concluded that $16,798.68 was the difference between the value of the vessel at the time of delivery to the buyer and the value it would have had if it had answered the warranty. When the sum of $16,798.68 is deducted from the purchase price of $25,000.00, it would indicate that the vessel had a value of $8,211.32 at the time of its sale to the appellees. This would appear most generous in view

of the fact that appellants had paid $10,000.00 for it the year previous and, in the meantime, had practically demolished the bow as well as further damaging the engine.

In any event, the use of repair costs in determining damages for breach of warranty is generally accepted.

> "Where the buyer keeps and uses the property and by the exercise of reasonable expenditures has made the article conform to the warranty, the amount of such expenditure has been held to measure the buyer's damages and may be recovered in lieu of the difference between the actual value of the article and its value if it had been as warranted and it has been held in some cases that the reasonable costs of putting an article in the condition warranted represents this difference in value." 77 *C.J.S.* 1328.

In the case of *Moss v. Yount,* cited supra, it was stated in regard to the assessment of damages under the Uniform Sales Act:

> "We think the court was in error in treating defendant's counterclaim as a sham plea, or that the evidence disclosed it as such, to the extent of *defendant's expenditures in trying to repair the tractor,* and the loss of time (including idleness of his employed force while making such reasonable efforts to repair), since such items are clearly the direct result of the defective condition of the tractor.
>
> Defendant—if there existed either an express or implied warranty—was thereby authorized

to make reasonable efforts to restore the purchased article to a condition where it would serve the purpose for which it was bought and intended to be appropriated by him, and his expense while making such reasonable effort, would become the proximate result of a breach of either the express or implied warranty, if one existed." See also *National Sheet Metal Co. v. McKenzie,* 8 S.E. 2d 93, 62 Ga. App. 292; 55 *C.J.,* p. 881, notes 77, 78; *Acme Brick Co. v. Hamilton,* 238 S.W. 2d 658, 218 Ark. 742; *Spero Elec. Corp. v. Wilson,* 71 N.E. 2d 827, 330 Ill. App. 622; *Cobb v. Truett,* 11 So. 2d 120; *American Laundry Mach. Co. v. Blecher,* 152 S.W. 853; *Stillwell etc. Mfg. Co. v. Phelps,* 130 U.S. 520, 32 L. Ed. 1035.

In the last cited case, the Supreme Court of the United States held:

"The rule of damages adopted by the court below, of deducting from the contract price the reasonable cost of altering the construction and setting of the machinery so as to make it conform to the contract, is the only one that would do full and exact justice to both parties and is in accordance with decisions upon similar contracts."

Similarly, in the subject case, the court adopted the only measure of damages that would do substantial justice between the parties. The vessel was purchased on the basis that it would need certain repairs and that these repairs could be effected for $5,000.00. The repairs were immediately undertaken by competent mechanics and ship carpenters. If the

vessel had answered the warranties it would have been repaired for $5,000.00 Appellees' actual costs were shown to be $27,478.86. The court, in determining the damages, resolved all doubts in favor of the appellants, disallowing the items for repairs of the tail shaft, stuffing box, battery plates, copper painting the vessel and the work performed by appellees' employees other than Mr. Blanchard; concluding that $21,798.68 was necessarily spent in restoring the vessel to the condition warranted.

Evidence by expert witnesses as to the difference between the value of the vessel at the time of its delivery to the appellees and its value if it had answered to the warranties could not have been as accurate in determining that difference as the actual costs involved in bringing the vessel up to the condition warranted, especially in view of the fact that the contract was entered into on a basis that the vessel would be repaired and that the repairs could be made for the sum of $5,000.00.

The cases cited by appellants in regard to their contention that the only testimony admissible to show the damages would be that as to the value of the boat without regard to the costs of repairs do not sustain their contention. Thus, in the case of *Fairbanks Steam Shovel Co. v. Holt & Jeffery* (Sup. Ct. of Wash., 1914), 140 P. 394, a steamshovel warranted to be in "first class condition" was found to have a defective boom some five and one-half months after its sale. The measure of damages was determined on the basis

of the cost of replacing the defective boom. The buyer introduced evidence as to the actual cost of the boom, $2,369.88. There was also testimony to the effect that the cost of a new boom would not exceed $843.00. "As between these sums the court arbitrarily allowed the sum of $1,000.00." This was upheld by the Supreme Court of the State, although apparently no evidence was introduced as to the difference in value of the steamshovel at the time of its sale if it had answered the warranty and if it had not. In other words, the court evaluated the evidence as to the costs of repairing the shovel to the condition which it was warranted in exactly the manner followed by the learned trial judge in the subject case.

The case of *Burnley v. Shinn,* 141 P. 326, cited by appellants, involved a suit for rescission of the sale of a car after it had been damaged due to the fault of the purchaser. Quite obviously repair costs would be inapplicable in that situation and no evidence was introduced upon which the court could award damages.

Perine v. Buck, 156 P. 20, involved the sale of an impeller which was installed in a used pump by the purchaser. The court quite properly held that the cost of repairs of the pump which was not a part of the sale could not be used as a basis of damages.

Abrahamson v. Cummings (Wash.), 117 P. 709, and *Denver Horse Importing Co. v. Shaefer* (Colo.), 147 P. 367, involved the sale of horses and, of course, the question of applying the costs of repairing an article to meet its warranted condition was not involved.

The case of *Fryburg v. Brinck,* 12 P. 2d 757, involved a counterclaim by the purchaser of a radio upon the basis that it did not comply with the warranty. The purchaser requested an instruction to the effect that the balance of the purchase price would not have to be paid due to the defect. The court held that this was not a correct measure for damages due to the presence of a warranty. As dictum, the court stated that the measure of damages was the difference of market value as warranted and the market value in view of the defects. The case, however, quite apparently does not come under the Uniform Sales Act which applies the rule for damages quoted in the extract from Remington Revised Statutes of the State of Washington and cited supra.

Likewise, the case of *In re Buswell's Estate,* 22 P. 2d 317, is not in point as it involves a shipment of lumber not conforming to representations. As in the case involving sales of horses, cost of repairs could not be used as an indication of the difference between the value of the goods at time of delivery and the value they would have had had they answered the warranty.

Appellants also contend that the court erred in refusing to admit evidence as to whether appellees had sold the vessel in 1950, two years after the date of the purchase of the vessel. The court quite properly considered that such evidence was too remote to throw any light on the question of the value of the vessel at the time of its delivery to appellees, which is the proper measure of damages in such cases. The

court found that repairs in addition to those necessary to place the vessel in the condition warranted had been made, and to permit evidence of resale over two years later would involve so many intervening factors, such as additional work performed on the vessel and changes in market conditions, would not throw any light on the material question in regard to damages, namely, the relationship of the value of the vessel at the time of delivery to the buyer as compared with the value it would have had at that time had it answered the warranties.

Appellants further question the award of $500.00 damages for the wrongful appropriation by the appellants of appellees' 18 ft. steel lifeboat. Mr. Owens testified that the boat was worth $1,000.00. (Tr. 119.) Mr. Oaksmith, appellants' witness, testified it had a value of $300 to $400 as a used lifeboat although it would be worth $1,000.00 new. (Tr. 281, 282.) It certainly was within the trial court's province to determine the damages due to the failure to return the lifeboat to be $500.00.

The court also awarded damages for the loss of the use of the vessel. This damage resulted directly from the breach of warranty and it is well settled that, upon adequate proof, damages are allowable for loss of profits in cases of misrepresentation.

> "Under the rule discussed supra, Sec. 374, that the buyer may recover all his damages on a breach of warranty by the seller, a buyer sustaining damages is not prevented from recovering anticipated profits merely because they are such.

> Hence, prospective profits may be recovered where they have naturally resulted from the breach, provided they are not too remote, speculative, or uncertain." 77 *C.J.S.,* Sec. 379.

Mr. Owens testified that his logging camp at Menafee Inlet produced 7,500,000 feet of logs during the period that the vessel was delayed due to the breach of warranties made by the appellants. He stated that had the vessel been available, 5,500,000 feet would have been delivered by him at a price of $4.00 per thousand. This price was actually paid for the delivery of the logs and, had appellees had the vessel available, they could have received that price for so delivering them. Mr. Owens estimated the profit which he could have made had the vessel been available at $11,000.00. (Tr. 116 and 117.) Of this sum the court allowed $7,733.33.

The testimony in regard to the loss of profits was specific and based on actual logs produced and available for delivery. The appellants had ample opportunity to cross-examine as to the basis for Mr. Owens' computations as to loss of profits which detailed testimony would not have been proper on direct examination. The testimony stands uncontradicted and unshaken.

The old case of *Puget Sound Iron & Steel Works v. Clemmons,* 72 P. 465, decided by a split court and cited by appellants to the effect that loss of profits may not be recovered, does not constitute any authority under the Uniform Sales Act. The allowance for

loss of profits under a situation somewhat analogous to that at bar was allowed by the Supreme Court of the State of Washington in the case of *Suryan v. Lake Washington Shipyards,* 300 P. 941, cited supra. In that case, a vessel was sold to the plaintiff who used it for fishing in Alaskan waters. On June 12, 1928, the vessel developed a leakage and was towed into port where temporary repairs were made. The court held:

> "The defendant knew that the boat which it constructed for the plaintiff was intended for use as a fishing boat in Alaska waters during the herring season of 1928; knew that the fishing season for herring in those waters was limited; and must have contemplated that, if the boat proved unseaworthy through its faulty construction, it might become necessary, when stress of weather arose, to jettison the cargo and seek aid in order to save the lives of the crew and bring the helpless boat into port. So far as concerns the allowance for loss of profits during the time the boat was laid up for necessary repairs, as awarded by the trial court on item 1, it is sufficient to say that this court is committed to the doctrine that, in such a case as this, prospective profits may be the basis of recovery if they can be estimated with reasonable certainty. *Florence Fish Co. v. Everett Packing Co.,* 111 Wash. 1, 188 P. 792, 796; *Warner v. Channell Chemical Co.,* 121 Wash. 237, 208 P. 1104; *Goldstein v. Carter,* 157 Wash. 405, 288 P. 1063; *Watson v. Gray's Harbor Brick Co.,* 3 Wash. 283, 28 P. 527."

Similarly, in the subject case, appellants knew that the vessel was to be used by appellees in their logging

operation in Alaska; that logs could be towed in Alaska for a limited period of time only; and that, if the vessel did not comply with the warranties, the delay necessitated in repairing it so as to bring it up to its warranted condition would result in loss of profits.

CONCLUSION.

The evidence in this case revealed, and the learned trial court found, that appellants both impliedly and expressly warranted the condition of the vessel TP 100 at the time of its sale to appellees. Appellants were informed of the nature of appellees' business and the purpose for which they desired the vessel. The representations made by the appellants were false and, in most respects, were made by the appellants with the knowledge of their falsity, for the purpose of inducing appellees to purchase the vessel. Appellants represented that the vessel was in good condition except for one crankshaft bearing and a bruised forefoot. They represented that the bruised forefoot was caused by striking a log while proceeding from Alaska to Seattle when, in fact, they well knew that the vessel had forcibly run into a rock, practically demolishing the bow, which damage could not be seen during a casual inspection of the vessel due to the fact that it was below the murky water line of Lake Union.

The engine, instead of being in good condition aside from the one defect noted, had in effect been burned

out, the damage not being visible without tearing the engine down. It was shown that all main bearings were either completely wiped out or the babbitt was cracked with pieces missing; all main bearing journals were scored and approximately 1/8th of an inch under the original shaft diameter. The water pump was plugged. Teeth were missing from the drive gear and the gear was beyond further use. The shafts of the fresh and salt water pumps were bent and the bearings were beyond further use. The crankshaft itself was distorted 3/64ths of an inch, being warped so as to be unusable. The oil columns were packed solid with babbitt the full length, and the base of the engine, due to the intensive heat, had been warped. Although this damage, with the exception of the one crankpin which had been hung up, was not readily visible, the appellants, with their intimate knowledge of the vessel, must have known of the engine's actual condition at the time that they represented it to be in good condition with the exception of the one crankpin.

Appellants further warranted that the vessel was not leaking although they must have known that the forward portion of the vessel ahead of the water-tight bulkhead was taking water freely. Appellants also stated that the vessel could be placed in first class condition by an expenditure of $5,000.00, which representation also was untrue. The trial court assessed the damages on the basis of the difference in value of the vessel at the time of delivery to the buyer and the value that it would have had if it had answered

to the warranties. The trial court also allowed damages for loss of profits which directly and naturally resulted from the breaches of warranty.

It is respectfully submitted that the judgment of the learned trial court should be affirmed.

Dated, Juneau, Alaska,
October 24, 1952.

CHADWICK, CHADWICK & MILLS,
JOHN E. MANDERS,
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No. 13,313

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co.,

Appellants,

vs.

A. E. OWENS, FERN OWENS, and R. F. OWENS, co-partners, doing business as Owens Brothers,

Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

SUMMARY OF ARGUMENT.

The parol evidence rule is a rule of substantive law and is not waived by failure to object at the time evidence is received. The alleged express warranties were in fact not warranties and the sale of the vessel was made on an as is, where is basis and appellees were not entitled to damages based on alleged oral

warranties where admittedly the agreement of the parties was reduced to writing. To allow damages for breach of alleged oral warranties would charge appellants for a sale agreement they never made.

Discussion as to implied warranties is beside the point in this case. The Court made no findings of fact or conclusions of law as to implied warranties and the judgment is not based thereon.

As a matter of fact the vessel was sold on an as is, where is basis as it appears from all the testimony and the alleged express warranties were not warranties at all. The Court made no findings of fact concerning any reliance of the buyers upon any alleged express warranties and in fact the evidence is clear that appellees did not rely on the alleged oral representations.

In this case there is no evidence that the vessel as purchased by the plaintiffs in its damaged condition was not worth the sum of $25,000 and there is no evidence that the vessel as repaired and improved was not worth the purchase price plus the cost of all of such repairs and improvements. Appellees in fact were not damaged at all. Appellees have here in effect attempted to charge appellants with the cost of completely overhauling and rebuilding the motor and with the cost of a completely refurbished and reconditioned boat instead of a boat in the condition of the alleged warranties. The cost of repairs and improvements is not the proper measure of damages under the circumstances of this case.

Appellees' alleged damages on account of alleged loss of profits are wholly speculative and uncertain and are outside the scope of what appellants might reasonably be assumed to have undertaken in the event they had made any warranties and accordingly such damages as allowed by the Court were improper.

ARGUMENT.

Appellees in their brief divide their argument into six main headings.

In this reply brief appellants will consider first appellees' fourth point concerning parol evidence. If appellants are correct in their contention that such oral evidence should not have been admitted, and is not a proper basis for a judgment against appellants, that decision alone would decide the case.

Appellees in their brief apparently concede that parol evidence to vary or change a written contract is not admissible as a general proposition. However they claim that such rule is not applicable in the instant case for the reasons that, (a) it is contended that the evidence was admitted without objection and that accordingly the evidence admitted must stand, and in the alternative, that, (b) the evidence in question was admissible for the reason that the written agreement was not the complete agreement between the parties and therefore comes within the exception to the parol evidence rule cited by appellees and that, (c) in any event oral evidence of the express warran-

ties was admissible as a basis for showing fraud in the inception of the agreement.

The parol evidence rule is not a mere rule of evidence but is one of positive or substantive law.

20 Amer. Juris., Evidence, Section 1100, page 963, and cases there cited.

Section 1101, Evidence, 20 Amer. Juris. 963, insofar as here material, reads as follows:

> "Where the question arises in the trial court, it is generally held that objection to the admission is not waived merely by reason of the fact that it was not made at the time the evidence was offered. No effect can be given to such evidence provided the trial court is asked in due form to instruct the jury that the previous negotiations were merged in the written contract * * * It has also been held generally that such evidence will be disregarded although no objection is made thereto."

Appellants at the close of plaintiffs' case in the trial court in the subject action moved for dismissal of the action or for judgment on the grounds that plaintiff had failed to make a case and one of the grounds was that no warranties were contained in the written agreement (R. 229).

See also argument of attorney for appellees and discussion of the Court (R. 229-230).

The difficulty here is not that certain alleged oral warranties were or were not made prior to the signing of the written agreement, but the fact that the

agreement did not contemplate any warranties whatsoever. To come in at a later date and claim that the written agreement in fact was not the entire agreement and that the defendant should be liable on alleged express oral warranties not contained in that agreement is an attempt to hold the defendants responsible for a sale which in fact they never made.

There is little or no dispute in this case as to the language used by the parties leading up to the sale in question. Mr. Owens for plaintiffs testified as follows:

> "He, (meaning Anderson), stated that their price for the boat was $25,000 *if we took it as it was there,* or that they would put it in first class condition for $30,000." (R. 74.)

On cross-examination Owens was asked the following question:

> "Q. Well, at first he said, 'I will fix the boat up and you can buy it for $30,000 or if you want it to take it and fix it up, it will be $25,000', isn't that right?"

and answered,

> "A. I think that is correct." (R. 122.)

Unless we are mistaken, the above comprises the whole testimony offered by the appellees concerning the agreement to sell and buy.

From the standpoint of appellants, the evidence concerning the agreement to sell was as follows. Mr. Saindon testified as found on page 240 of the record:

"About the price—the price, too was spoken of, as $25,000 as she sits, as is, and Anderson also said $25,000 as she sits and $30,000 if he fixed it up.

Q. If Anderson fixed it up?

A. Yes."

Appellant Jack C. Anderson, Sr., testifying as to his first conversation with appellee Owens, testified that Owens came aboard the vessel and asked him if it were for sale and what he was asking for the vessel, and testified he replied, $25,000 (R. 297). On a later visit of Mr. Owens to the vessel Mr. Anderson testified that Owens asked him, "What is the best that you will do on the boat?" and that Anderson answered, "The best that I will do on the boat is I will take $25,000 as is, or $30,000 and fix it up in running order." (R. 300). Still later Mr. Owens came again to the boat and according to the testimony Mr. Owens asked if that was the best he (Anderson) would do on the boat and Mr. Anderson answered "Yes". Later in the same conversation Owens asked again if that was the best that Anderson would do on the vessel and Anderson told him yes that the best he would do would be the offer he gave Owens the other day and that thereupon, Anderson informed Owens that he was talking to the people in Vancouver who were interested in the boat as is, where is, and asked Owens what Anderson should tell them and Owens said, "tell them that you have sold the boat" and then Anderson in the presence of Owens informed the other parties that he had sold the boat and Owens

promised that he would have the $5000 down payment in escrow not later than the following Monday (R. 302-303). On page 303 in further testimony of the same witness, it is said, in talking about the conversation with Mr. Owens, "That when I—if he bought the boat, I wanted him to pay $25,000 for the boat. That is what I wanted for the boat, see—take it as is, where is. If he paid $30,000 for the boat, $10,000 down, I would fix the boat in a running condition. So, he said over there at the phone he would take the boat as is for $25,000, $5000 down." (R. 303). Witness Jack C. Anderson, Jr., was asked concerning the agreement made for the purchase of the vessel and stated, "It would be $30,000, $10,000 down and $2000 a month, if we fixed the boat, and then my Dad gave him that alternative, or they take the boat as she was for $25,000, $5000 down and $2000 a month." (R. 368). On cross-examination of this witness appearing at page 381, the question was asked as to whether at that time it was agreed that appellants would make the repairs to the vessel and sell it to appellees for $30,000 and the witness said, "Yes, sir," and then the question was asked if in the alternative Mr. Owens was to make the repairs to the vessel that it would be $25,000 and the answer was, "Yes sir; and he takes her the way she was."

It is significant that appellee A. E. Owens testified in rebuttal in this case but he never at any time repudiated any of the testimony on behalf of appellees concerning these matters. He did say that he didn't recall as to whether or not Saindon was present at

any time when he talked with the appellants and on page 397 of the record on rebuttal and in answer to a leading question of his counsel Mr. Owens did testify that Anderson never told him to take the vessel as is, where is.

From all the evidence, including the evidence of the appellees on direct and cross examination, it seems clear that the language used couldn't be anything else but that the sale was made for $25,000 on the basis that the appellees took the boat as it was where it was. Appellees were to gain the difference if it didn't cost $5000 to make the contemplated repairs and appellees undertook to stand the loss if such contemplated repairs exceeded $5000. Any other conclusion would ignore the plain meaning of the words used.

Williston on Sales, Revised Edition, discusses the question of parol warranties in Section 215, commencing at page 554, and states:

> "There is nowhere a more frequent application of the parol evidence rule than in cases where it is sought to attach a parol warranty to a written sale or contract to sell goods * * * and even where there is no express warranty contained in the writing to which the terms of the sale are reduced, extrinsic evidence of a warranty generally is excluded." Citing cases.

Again, in the last paragraph of page 559, the author uses the following language:

> "The distinction is somewhat fine, and it must be admitted that even under the broad definition of warranty contained in the Sales Act, parol

> evidence of such representations has been rejected. The Courts do not seem to regard the Statute as varying previously existing rules on the matter."

See also the cases cited under note 13 on page 559, particularly the Federal cases.

In reply to the contention that the written agreement does not purport to contain the entire contract between the parties, it appears from the agreement itself that it is a complete and binding contract between the parties.

As to appellees' contention that the oral statements might be used to prove fraud, there is no question but that fraud in the inducement of a contract is a recognized exception to the parol evidence rule. However, that has no application in this case. In the first place the trial Court did not make any findings or conclusions as to fraud and the judgment is not based upon fraud. It is based upon alleged express oral warranties. In the second place, the alleged conversations were not introduced or accepted for the purpose of proving fraud but for the purpose of showing express oral warranties. Plaintiff failed to prove some of the essential elements of a fraud case and in particular failed to prove that the appellants as sellers knew of the falsity of the alleged oral misrepresentations, and failed to prove that Owens was ignorant of the alleged falsity of the so-called representations or that Owens relied or had any right to rely on the so-called representations.

We believe that we have conclusively shown that appellants were not entitled to prove alleged oral misrepresentations and that in fact they bought exactly what they intended to buy and that accordingly, defendants' motion for judgment at close of plaintiffs' case should have been granted.

The first section of appellees' argument is to the effect that there was an implied warranty made by sellers which warranty was breached.

In answer to that argument we believe that it is sufficient to say that there were no findings of fact as to implied warranties, there were no conclusions of law concerning implied warranties, and the judgment as given is not based on implied warranties, but is based specifically upon a claimed breach of certain alleged oral express warranties.

We will consider appellees' arguments numbered two, three and five together.

Three express elements are essential to an express warranty. First the sellers must have made an affirmation of fact or a promise relating to the goods. Second the natural tendency of such affirmation or promise must be such as to induce the buyer to purchase the goods. Third the buyer must have purchased the goods relying on the affirmation of fact or promise made by the seller. The section specifically states that no affirmation of value of the goods nor any statement purporting to be a statement of the seller's opinion shall be construed as a warranty.

Appellee on page 19 of his brief claims that five express warranties were made in this case.

The language used by the parties in their discussion is before the Court. All of the so-called warranties named by the appellees are their conclusions from the language used save the one that the vessel was not leaking.

From the record it is extremely doubtful as to whether appellants ever told the appellees that the vessel struck a log and not a rock. It also seems clear that the appellants never at any time told anyone that the forefoot was slightly bruised. They said that the forefoot was damaged, and so it was. Whether in fact it was damaged by striking a rock or by striking a log is immaterial. As a matter of fact it was damaged. Everybody knew it was damaged. Appellants pointed out the damage to appellee and actually took him and showed him where the splinters were hanging down below the water (R. 363). As a matter of fact while none of the parties knew the extent of the damage to the bow, since the vessel had not been put in dry dock, everybody knew that there was considerable damage there and it was contemplated by all the parties that the boat would be put in dry dock and that a large portion of the $5000 which appellants intended to spend if they had repaired the boat would have been expended in making the repairs to the bow.

It appears that appellants did say on one occasion that the boat was not leaking. As a matter of fact

from all the evidence offered it appears the vessel was not leaking. Even the appellees admit that the boat was not leaking behind the watertight compartment which was immediately back of the chain locker and if in fact the boat was leaking into the chain locker, that leak was due to a condition which was specifically pointed out to appellees and which they elected to repair themselves.

So far as the engine is concerned, it is clear from the evidence that the engine had been running satisfactorily except as to the operation of one cylinder. The damage in connection with that cylinder was specifically pointed out to appellees.

The claim that appellants warranted that expenditure of $5000 would put the vessel in good condition is strictly a conclusion made by appellees from the conversations above related. Upon all the evidence appellants did not make any such statement of fact or promise.

The trial Court in its finding number seven, pertaining to the motor, found that appellants had stated that the vessel was in fair condition (not in good condition as claimed by appellees) with the exception that the crankshaft pin for number five cylinder was scored. The trial Court made no finding that the natural tendency of such statements as were made was to induce the buyers to purchase the vessel nor that the buyers purchased the vessel relying thereon.

Accordingly the findings of fact do not contain findings as to two of the essential elements of express

warranties. There is no basis in the findings of fact for the conclusion of law to the effect that the defendants made express warranties in regard to the condition of the vessel or for the further conclusion that the warranties made by the defendants were such as to induce the plaintiffs to and did induce the plaintiffs to purchase the vessel in reliance thereon, nor for the further conclusion that the plaintiffs purchased the vessel in reliance on the alleged warranties.

As a matter of fact, taking the record as a whole, it is apparent here that nothing that appellants said induced the buyer to buy the vessel. Likewise it is apparent that the buyer did not purchase the goods relying upon the alleged warranties.

It was testified by the witness Oaksmith and never denied by the appellees that Oaksmith had informed appellees prior to the time they purchased the vessel that he had reason to believe that the vessel had a flat crankshaft. This was followed by the testimony of Captain Anderson, Sr., to the effect that appellee A. E. Owens before he purchased the vessel told the witness that he had heard that the vessel had a twisted or bent crankshaft (R. 300). This testimony was not denied by the appellees. Appellant Jack Anderson, Sr., testified that he had certain conversations with A. E. Owens before the vessel was purchased concerning method of removal of the crankshaft if that should be necessary and that such appellee stated that if such a thing should be necessary he believed that

he could get a surplus crankshaft at Juneau. Mr. Owens denied this conversation but a portion of the conversation was apparently overheard by Mr. Saindon, at least that portion having to do with the method of removal of the crankshaft through the stack.

All in all it appears that appellees either knew or believed that it was quite probable that the crankshaft would have to be removed. Certainly they knew that the engine was not new and that it had not been overhauled. Certainly a man with Mr. Owens' experience in connection with boats must have known that it would run into considerable money if he intended to overhaul the entire engine.

Appellees' testimony is vague and uncertain concerning the time when he called the Fairbanks Morse man down to look into the engine, but it appears that Mr. Engstrom, the Fairbanks Morse man, was working on the motor sometime prior to the time Blanchard came down to go to work on the boat and Blanchard estimated the time of his arrival as being anywhere from the 15th to the 20th of April. It is likewise in doubt as to when the first payment was made in connection with the purchase of the vessel but taking April 22, the earliest time suggested, it is apparent that appellee must have been fully informed as to alleged defects in the engine at the time he made the first payment.

As pointed out in the previous brief, appellees bought this boat because they needed it, because the

price was right and because the terms were advantageous. They didn't buy it relying on any alleged warranties.

We call the Court's attention to the recent case of *Hugo v. Loewi v. Smith,* decided by this Court and found at 186 Fed. 2d 858.

See also the following cases:

Murphy v. National Iron Company, Arizona, 227 Pac. 2d 219;

Topeka Mill v. Tripplett, Kansas, 213 Pac. 2d 964;

Dunbar Brothers v. Consolidated Iron & Steel, 23 Fed. 2d 416;

Kull v. Noble, Arkansas, 10 S.W. 2d 902;

Kraig v. Benjamin, Connecticut, 149 Atl. 687;

Dunn v. Vaughn, Oklahoma, 251 Pac. 472.

The Trial Court in this case made a finding that a specific representation was made. We believe that such finding is not binding on this Court. It is not supported by substantial evidence and is against the weight of evidence. It is based on testimony not in dispute or in any event not seriously in dispute.

We call the Court's attention to the discussion of Rule 52 of the Federal Rules of Civil Procedure as found in Barron & Holtzoff, Federal Practice and Procedure, particularly Sections 1133, page 833, Section 1134, page 845 and pocket part page 108, and Section 1135, page 849.

On all the evidence in the case we think that this Court should hold that the Trial Court's finding as

to representations and its conclusions as to warranties was erroneous and that judgment should not have been entered for the appellees and against appellants.

We will now consider appellees' argument No. 6 having to do with damages. This matter has already been argued extensively in our opening brief. However, appellees in their brief (page 33) claim that the Court followed Section 5836-69 of Remington's Revised Statutes of the State of Washington in determining the alleged damages in this case. We disagree. On the face of it there was no evidence from which the Court could have applied that rule. As previously pointed out there was no evidence whatsoever that the vessel would not have operated satisfactorily insofar as the engine was concerned upon the expenditure of $300.00 for returning the number three crankpin. However, be that as it may, it goes without saying that the parties did not contemplate that appellees would completely overhaul and rebuild the engine at the expense of appellants. Appellee Owens claims that the crankshaft was unfit for use and bases his claim on what was told him by Mr. Engstrom, the Fairbanks Morse man. As a matter of fact Mr. Engstrom does not so testify in his deposition. Admitting that the crankshaft was warped, as it was testified by Mr. Engstrom, there is no evidence at all that the warping would have interfered in any way with the operation of the motor. The only possible conclusion here is that appellees desired a rebuilt motor and rebuilt it to their saisfaction.

That was their privilege. They are not entitled to charge such rebuilding against appellants. It is apparent that a completely rebuilt motor with a brand new crankshaft was in a much better condition than called for by the Court's finding that the appellants represented that the motor was in fair condition with the exception of the crankshaft pin for No. five cylinder. The burden was on the plaintiffs to show their alleged damages and having co-mingled items done on the motor in completely rebuilding the motor to their own satisfaction, with items allegedly required to be done to place the motor in a fair condition, they have made proper assessment of damages impossible. Had appellants proved that the boat as sold was reasonbly worth one amount and that the boat as they claim it was warranted was worth some other amount, the difference would be the damage suffered.

There is no evidence at all that the repairs made to the bow exceeded the amount which appellants estimated they would cost. Once again appellees have mingled together items which might properly be charged to fixing the bow as contemplated by the parties with other items not so contemplated and when they got done they had a boat with the bottom completely cleaned and copper painted, new planking here and there and other items which are not specified.

The Trial Court, over objection of appellants, required appellants to testify as to the cost price of the boat to them at surplus sale. In appellees' brief

(page 33) it is argued that the damages charged against appellants were not excessive because the vessel was purchased for $10,000 and extensive damage had been done to it since that time. It is common knowledge that the price of property purchased at an Army Surplus Sale has little relation to its actual value and certainly it had no relation at all to the actual value of the vessel at the time it was sold, approximately one year later.

We believe that it can be fairly deduced from the evidence that the vessel, in the condition in which it was sold to appellees, was reasonably worth $25,000. There is evidence in the record that similar vessels at that time were being offered for sale at Seattle for $35,000. There is undisputed evidence in the record that other parties, who had made a survey, desired to purchase this vessel in its damaged condition for the sum of $25,000 and that such sale was prevented when appellees agreed to buy the vessel and asked appellants to notify the other parties that it had been sold.

There is no evidence at all that the vessel was not worth the purchase price of $25,000 plus the cost of all the repairs and improvements made by appellants upon completion of the repairs and improvements.

It is our contention that in the event plaintiffs were entitled to any damages, which we specifically deny, that the burden was on the plaintiffs to prove their damages and that the plaintiffs have not used the proper measure of damages in putting in their

proof and that the evidence of damages is so vague and uncertain and so co-mingled with other items that no court can properly assess damages on the evidence as it now stands and that the judgment for damages is not based on any substantial evidence.

The allowance made by the Court on account of alleged loss of profits by appellees remains to be considered.

Assuming for the purpose of argument that appellants knew of the work contemplated to be done by the tug for appellees, there is no evidence at all that appellants had any knowledge that appellees had seven million feet of logs or any other quantity of logs to be hauled, or as to the price which appellees were going to get for hauling the logs or as to the profit to be realized in hauling such logs. Neither is there anything in the evidence to indicate that appellants were ever advised that it was desired immediately to take the vessel North to haul logs.

As above set forth there was no showing at all that the vessel would not have hauled the logs satisfactorily had the repairs been limited to those contemplated by the parties.

On all the evidence it seems to us that the alleged damages for loss of profits is so speculative and uncertain that it cannot be said that appellants undertook to pay such damages in making the sale in question. Accordingly, although it is true that loss of profits may be considered as damages in a proper case, this is not such case and the allowance of dam-

ages adjudged by the Trial Court for alleged loss of profits was not justified by the evidence.

Dated, Anchorage, Alaska,
December 8, 1952.

Respectfully submitted,
DAVIS & RENFREW,
By EDWARD V. DAVIS,
Attorneys for Appellants.

No. 13,313

In the
United States Court of Appeals
For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co., *Appellants*,

— vs. —

A. E. OWENS, FERN OWENS and R. F. OWENS, co-partners, doing business as Owens Brothers, *Appellees.*

UPON APPEAL FROM THE DISTRICT COURT, TERRITORY OF ALASKA, THIRD DIVISION

APPELLEES' PETITION FOR A REHEARING

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THE ARGUS PRESS, SEATTLE

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In the

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UPON APPEAL FROM THE DISTRICT COURT, TERRITORY OF ALASKA, THIRD DIVISION

APPELLEES' PETITION FOR A REHEARING

To the Honorable William Denman, Presiding Judge and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellees respectfully petition this court for a rehearing of this cause and present the following specifications of error in its decision as ground for the granting of such petition:

I.

Failure to discuss the point argued and briefed on appeal to the effect that the judgment of the District Court should be affirmed upon the basis that the parol evidence was properly admitted on the question of fraud which was pleaded and proved.

II.

In ruling that an implied warranty of fitness cannot arise from sale of a specific item of personal property.

I.

Fraud on the Part of the Appellants Was Pleaded and Proved. Parol Evidence Is Always Admissible for the Purpose of Proving Fraud So that the Judgment of the Trial Court Should Be Affimed or, in the Alternative, the Case Remanded to the Trial Court for Further Findings on the Issue of Fraud.

The essential elements of actionable fraud are that "representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage." 23 Am. Jur. 773; 37 C.J.S. 215.

In their complaint appellees set forth that appellants made representations of fact, knowing them to be untrue with intent to deceive and for the purpose of inducing the appellees to act thereupon, and that appellees were misled and damaged thereby (See Paragraphs III and VIII of Complaint, Tr. 4, 7).

The evidence amply proved these allegations of fraud. Thus it was proved that representations were made as to the condition of the hull and engine of the vessel which appellants either knew to be untrue or made recklessly. Moreover, the elements of fraud are either spelled out or may be inferred from the opinion of the court below. The court found:

> "Anderson replied that the tug was in fair condition with the exception that the crankshaft pin for No. 5 cylinder was scored and that the forefoot or the stem was damaged from striking

a log on the trip to Seattle, but that the vessel did not leak." (Tr. 34)

The court found the facts in regard to the vessel to be as follows:

"An inspection of the engine by the witness Engstrom, the mechanical expert of the Fairbanks-Morse Company, presumably the manufacturer of the engine, disclosed that all the main bearings were ruined and the main bearing journals scored and ⅛ inch over the original shaft diameter; that the drive gear was useless because of several broken teeth; that the water pump was completely obstructed; that the salt and fresh water pump shafts were bent and the bearings ruined; that the crank shaft was warped from excessive heat and no longer useful; that the oil columns were clogged with babbitt from the bearings and totally obstructed and that a makeshift oil line had been installed to provide lubrication. The base of the engine was also warped from excessive heat. Engstrom testified that the warping of the base of the engine and the crankshaft was caused by heat of such intensity as could be generated only by a fire ignited in the base from friction as a consequence of a total lack of lubrication.

"The vessel was then placed in a dry dock, where an inspection revealed that the lower part of the stem, the entire forefoot, the forward end of the keel and the ends of the adjacent planks were almost completely splintered, that the stem plate hung by one end and that the forward watertight compartment was filled with water. It was also discovered that the tail shaft was oxidized from galvanic action or electrolysis to such an extent as to require replacement; that

> the battery required new plates; that the stuffing box was beyond repair and that the winches were frozen in consequence of rust and lack of lubrication." (Tr. 35, 36)

With reference to the statement that the vessel had struck a log on the trip to Seattle, the court found:

> "It was proved that instead of striking a log which would have caused relatively little damage to a tug of this size, the tug had struck a rock, and from the photographs of the bow, plaintiffs' exhibits Nos. 9 and 19, I am convinced that so much damage could not have resulted unless the vessel struck at full speed. The testimony of the defendant Anderson as to this incident was such as to seriously affect his credibility." (Tr. 36)

It is true that the court does not specifically find whether or not the false statements in regard to the condition of the engine, hull and the striking of an object on the trip south were made with a knowledge of their falsity or, in the alternative, recklessly. It would appear, however, that the facts in that connection speak for themselves. Certainly the representation that the vessel had hit a log on the trip to Seattle when actually it had rammed into a rock so forcibly as to demolish the bow below water line was a wilfully false statement and the element of knowledge necessarily is implied from the other findings of the trial court (See Findings of Fact 3 (Tr. 42), 7 (Tr. 43), 16, 17, 18 (Tr. 44), 20,21 (Tr. 45)).

Moreover the court found that these representations induced the Appellees to purchase the vessel and that the vessel was purchased in reliance thereon (Conclusion of Law 3 (Tr. 47)).

Thus the only requirement of fraud not fully expounded by the trial court in its findings of fact is that of knowledge on the part of appellants of the falsity of their statements, and as pointed out above this finding is necessarily inferred from the others made by the trial court. If this honorable court feels that there is any question on that issue or on any other factor involved in fraud, it is respectfully suggested that justice requires that the case be remanded to the trial court for additional findings.

> "If a judgment in an equity case or an action at law tried by the court is reversed, and an unsolved question of fact must be determined before judgment can be rendered, and there are conflicting reasonable inferences as to how such issue should be solved, rendering the right solution doubtful, the reviewing court will remand the cause to the trial court, with directions to determine such issue and then to apply the law to the case. This must be done where the jurisdiction of the reviewing court is strictly appellate, and it is not allowed to make findings of fact. Where the trial court has failed to make a finding upon a material issue or fact submitted to it for trial or for determination, or has made findings which are mere recitals of evidence with conclusion of facts, lack precision, and mix facts with inferences, or are ambiguous, the reviewing court will generally remand the case with directions to make proper findings, and where the case calls for findings in addition to those made, or the findings made are not sufficiently specified, the case will be remanded for additional findings, and where the trial court omits to make a finding of fact which covers the issue as to damages, the review-

> ing court will remand the case for a new trial, being unable to render a judgment for the plaintiff for any specific amount of damages. When, however, facts not controverted are admitted, or have been assumed by both parties, the failure to make findings thereof does not necessitate a remand." 3 Am. Jur. §1215.

There is no conflict of authority on the question of the admissibility of parol evidence in order to prove fraud, so that the question of the application of the parol evidence rule is disposed of when the case is considered on the basis of fraud (See 24 Am. Jur., Sec. 267).

In *Robinson v. Carter* (Mun. Ct. of App. for the District of Columbia) 77 Atl.2d 174, a sale of a boat under circumstances somewhat similar to the one at bar was involved, although the representations made by the seller were not nearly as patently false as those made by the appellants in the subject case. The court held:

> "Ordinarily what a contract says rather than what is in the minds of the parties should govern, but where a party is fraudulently induced to enter into a contract, the fraud cannot be rendered successful by reducing the contract to writing and then invoking the parol evidence rule."

That case involved a contract to sell a boat "as is" rather than one completely silent as to the condition of the vessel.

In the case at bar, fraud was pleaded and proved and accordingly the judgment of the court below should be affirmed or the case remanded for further findings in regard to the issue of fraud.

II.

A Breach of Implied Warranty of Fitness Was Pleaded and Proved. Under the Uniform Sales Act Implied Warranties Arise Under the Circumstances of This Case So that the Judgment Below Should Be Affirmed or the Case Remanded for Further Findings in Regard to Implied Warranty.

This learned court, in its opinion, sets forth Sec. 15 of the Uniform Sales Act (Remington Rev. Statutes, Sec. 5836-15) as follows:

> "Implied warranties or conditions as to quality or fitness. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract, to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose * * *."

The trial court found:

> "6. A. E. Owens informed the defendants that the plaintiffs were in the logging business in Alaska and desired to purchase a vessel for use in towing logs." (Tr. 43) and concluded:
>
> "2. The warranties made by the defendants were such as to induce the plaintiffs and did induce the plaintiffs to purchase the vessel in reliance thereon." (Tr. 47)

It is true that this conclusion may be regarded as

referring to paragraph one of the Conclusions of Law referring to express warranties. It may also be construed, however, to apply to implied as well as express warranties. This is especially true as the only purpose of making Finding 6 would be to show that the facts upon which an implied warranty are based were present. This is further brought out by the trial court's opinion wherein he set forth the applicable section of the Uniform Sales Act in regard to implied warranty (Tr. 38), and thereafter expressly tied the facts into that section by stating:

> "I also find that although Owens examined the vessel, it was not, nor could it have been, such an 'examination as ought to have revealed' (Sec. 15(3) Uniform Sales Act) the internal defects in the motor and the under-water damage to the hull."

If it is considered that there is any ambiguity on the question of the court's judgment being based in part on the breach of implied warranty, particularly in regard to a finding that appellees purchased the vessel in reliance "on the seller's skill or judgment," it is respectfully submitted that the case should be remanded for further findings on that point.

Apparently this learned court took the position that either such a finding is to be inferred from the trial court's Findings of Fact and Conclusions of Law, or that, in the alternative, the case should be remanded for further findings on the point if, as a matter of law, a breach of implied warranty could be found under the facts involved. The court concluded, however, that since this case involved the purchase of a specific ves-

sel the purchase could not have been made in reliance on the skill of the seller.

The case of *Long v. 500 Co.*, 123 Wash. 347, 212 Pac. 559, is cited as the principal authority for this point. That case, however, as is pointed out by the court involved a situation where the single specific article was not the subject of the contract of sale so that the Washington court's opinion in regard to sale of specific single chattels is merely dictum. Even more important is the fact that the *Long* case was decided in 1923. The Uniform Sales Act was adopted by the State of Washington in 1925. At common law it was uniformly held that sale of specific used items did not give rise to an implied warranty. That was changed with the enactment of the Uniform Sales Act. Thus it is stated in Williston on Sales, Vol. 1, Rev. Ed., Sec. 231:

> "As has been shown in the preceding section, it is more than a liberal rule of construction, it is an imposition of liability irrespective of (though not contradicting) the positive contract of the parties, to hold that there is a warranty of quality in case of a sale or contract to sell specific goods, where there is no promise or affirmation in regard to them. That such a warranty is imposed in some cases should now be well settled though in a few States the early law of *caveat emptor* seems still unqualified in sale of specific goods and occasionally early precedents confuse the statements of courts even in jurisdictions where those precedents have been practically overruled.
>
> "The reason for imposing such a liability upon the seller is that the circumstances of the bargain justify the buyer in inferring that the seller by the very act of offering his goods for sale, asserts or

> represents that they are merchantable articles of their kind or are fit for some special purpose, and that the buyer relies upon this implied assertion or representation."

In addition to the case of *Long v. 500 Co.*, cited *supra*, this honorable court has cited the case of *American Player Piano Co. v. American Pneumatic A. Co.*, 172 Iowa 139, 154 N.W. 389, 393, in support of the proposition that an implied warranty does not apply where the subject of the sale is a specific chattel. That case involved a 1910 contract of sale for the installation of a particular brand of action in pianos manufactured by the plaintiff. A reading of the case indicates clearly that it was not decided under the Uniform Sales Act. Moreover, the case involved the order of a particular invention. The defendant made the actions in accordance with specifications agreed upon in advance. That type of case, if decided under the Uniform Sales Act, would appear to come under the provision of subsection 4 which states:

> "In the case of a contract to sell or a sale of a specific article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

This exception to the statutory implied warranty is not involved in the subject case, and to extend such an exception would appear to require amendment of the legislation.

As we understand the opinion filed herein, if, as a matter of law, no implied warranty may arise from the sale of a specific single chattel, then there is no basis for affirming the judgment below on this ground. On the other hand, it follows that if an implied warranty

may arise from the sale of a specific individual chattel under the applicable law (the Uniform Sales Act adopted by the State of Washington), a factual question is then presented which lies peculiarly within the province of the trial court which is able to evaluate the testimony, so that the judgment below should either be affirmed or the case remanded for further findings.

It is respectfully submitted that a study of Section 15 of the Uniform Sales Act and cases decided thereunder leads inescapably to the conclusion that an implied warranty may be found under the circumstances involved in the subject case and that the decision in that regard is one best to be left to the trial court which has had the opportunity to hear the witnesses and study their demeanor on the witness stand and thus is best able to determine from all circumstances whether the buyer relied on the seller's skill and judgment.

Thus in the case of *Singleton v. Dunn*, 71 Ariz. 150, 224 P.2d 643, it was held that an implied warranty applied to a specific single chattel. Defendants were digging a well when plaintiffs approached them and informed the defendants that they were interested in going into the well digging business. After some negotiations, they purchased the specific well digger which the defendants were using as well as various parts which were shown them. The court, in finding for the plaintiffs, held:

> "In the instant case no efficient inspection was made although the jury could have found that opportunity was present. * * * To hold under the circumstances that the mere opportunity to inspect precludes justifiable reliance by the buyer on the

> skill and judgment of the seller and thereby forecloses the existence of this warranty would be a failure to do justice. *Drumar Mining Co. v .Morris Ravine Mining Co.*, 33 Cal. App.2d 492, 92 P. 2d 424."

In the *Drumar Mining Co.* case cited, *supra*, the defendant bought a gold washing machine after the defendant's president observed it in operation. As a defense to a suit for the purchase price, breach of the implied warranty of fitness was argued. Although the case dealt with a specific chattel, the court found that the defendant made known the purpose for which he intended to use it and relied on plaintiff's skill and judgment, and consequently judgment for the defendant was affirmed, the court stating:

> "There is no question but that the machinery was known by the purchaser to be used or second hand machinery and that defendant's agent had ample opportunity to see the same." 92 P.2d 427, and
>
> "An inspection without an operative test could determine nothing as to its fitness. The seller, to the buyer's knowledge, had made this test and the seller well knew the purpose and requirements of the buyer, and the buyer relied, and had a right to rely on the seller's skill and judgment. In such a case, it would appear that substantial justice requires the raising of an implied warranty."

Similarly, in the case at bar where the sellers knew of the buyer's purpose in purchasing the vessel and that his inspection without operative tests and placing the vessel in dry dock could determine nothing as to its fitness, the buyer had the right to rely on the seller's skill and judgment. Surely the Uniform Sales Act has

alleviated the harshness of the old doctrine of caveat emptor at least to the extent of preventing the sale without full disclosure of a vessel which had been run at full speed into a rock and had its bow below the water line to all effects demolished, and its engine all but ruined, to a buyer who has made known his purpose in purchasing the vessel and had not made such an examination as ought to have revealed these defects.

In *Savoie v. Snell* (La.) 35 So.2d 745, a specific automobile with a cracked engine block was sold to the defendant. Apparently the defect was not known by the seller at the time that the sale was made. Nevertheless, the court held that there was an implied warranty that the vehicle was fit for the purpose intended in the absence of an express waiver of the warranty. The Louisiana statute varies slightly from the Uniform Sales Act, but the same principal would seem to apply. See also *Kuhlman v. Purpers* (La. App.) 33 S.2d 84.

In *Regula v. Gerber* (Ohio) 70 N.E.2d 662, defendant purchased a second hand automobile from the plaintiffs, after being shown the specific vehicle. The court held:

> "There is nothing in the Uniform Sales Act, Sec. 8381 to 8456, inclusive, of the General Code, declaring there is no implied warranty in the sale of second hand chattels. It is specifically provided in Sec. 8395, G.C., that there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except (then this general statement is followed by several exceptions).
>
> "It is therefore quite clear that the legislature

> intended this section to apply to all sales of goods, whether new or second hand, which would include the sale of second hand automobiles."

See also *Bouchet v. Oregon Motor Car Co.*, 78 Ore. 230, 152 Pac. 888, to the same effect.

In the case of *Wallower v. Elder* (Sup. Ct. of Colo., 1952) 247 P.2d 682, the effect of the Uniform Sales Act on the question of an implied warranty arising on the sale of a specific single chattel is well illustrated. Elder sold to Wallower a used Chrysler motor and used grinder to be placed upon a trailer with other equipment to be used in connection with a hay dryer also purchased. The Chrysler motor and grinder were on hand at the time the sale was made and the specific items were purchased.

In referring to Section 15 of the Uniform Sales Act, the court stated:

> "Nothing could be clearer than that the terms of the Act are directed to the sale of all chattels. There is no exclusion of used goods in the defition of property to be covered by the Act and when the trial court ruled that the Act did not apply as to used or second hand goods, it was equivalent to reading into the statute an exception which the legislature, in its sole province, did not see fit to do."

The court found:

> "The evidence shows that the motor was started and run idle for a short time in Wallower's presence, but it is also disclosed that at no time did Wallower have an opportunity to inspect the motor when operating under a load which would develop defects that would not show up while idling."

This reference is quite analogous to the cursory inspection made by the appellees in the case at bar without the benefit of a full examination of the motor or an examination of the hull in dry dock.

In affirming judgment for the buyer in the *Wallower* case, the court stated:

> "Wallower would have been justified in relying upon the seller's representation and judgment in the matter, but if this question was in the least doubtful, it was for the jury to settle, and it determined that fact in Wallower's favor. We believe that the testimony supports the finding of the jury that there could be an implied warranty under the circumstances. It is rather apparent that the trial court in finally determining the motion for directed verdict, after the verdict, relied upon Colorado cases which were decided before the Uniform Sales Act was adopted. It being clear that the Uniform Sales Act does cover used or second-hand chattels, and that here the buyer, not entirely by implication, but expressly, made known to the seller the particular purposes for which he desired to use the articles in question, and that he relied on the seller's judgment, there is an implied warranty that the equipment sold to him was reasonably fit for the desired purposes, and this conclusion is fortified by the jury's finding to that effect."

Similarly, in the case of *Dubinsky v. Lindburg Cadillac Co.* (Mo.) 250 S.W.2d 830, where a specific Cadillac car was purchased, the court held that there was an implied warranty of fitness.

It thus appears that the great weight of modern authority holds that, under the Uniform Sales Act, an

implied warranty of fitness may arise upon the purchase of a specific single chattel, and it is respectfully submitted that the question as to whether such warranty arises in a particular case is one to be answered by the trier of the facts.

Dated, Juneau, Alaska, June 22, 1953.

Respectfully submitted,

CHADWICK, CHADWICK & MILLS,
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By R. BOOCHEVER,
Of Attorneys for Appellees and Petitioners.

CERTIFICATE OF COUNSEL

I, R. BOOCHEVER, one of counsel for the appellees and petitioners, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and I further certify that the same is not interposed for delay.

Dated, Juneau, Alaska, June 22, 1953.

R. BOOCHEVER,
Of Counsel for Appellees and Petitioners.

No. 13314

United States
Court of Appeals
for the Ninth Circuit.

REPUBLIC PICTURES CORPORATION, REPUBLIC PRODUCTIONS, INC., and HOLLYWOOD TELEVISION SERVICE, INC.,

Appellants,

vs.

ROY ROGERS,

Appellee.

Transcript of Record
In Seven Volumes

Volume I
(Pages 1 to 476)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern District of California, Central Division

No. 13220-PH

ROY ROGERS,

Plaintiff,

vs.

REPUBLIC PRODUCTIONS, INC., a New York Corporation; HOLLYWOOD TELEVISION SERVICE, INC., a Delaware Corporation; DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE, and DOE TEN,

Defendants.

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION, AND FOR DAMAGES

Plaintiff complains of defendants, and each of them, and alleges that:

I.

The plaintiff, Roy Rogers, is a citizen and resident of the County of Los Angeles, State of California.

II.

Plaintiff is informed and believes and therefore alleges that defendant, Republic Productions, Inc., is a corporation duly organized and existing under the laws of the State of New York, and is a citizen of said State, and is duly qualified to do business

in the State of California, and is doing business in North Hollywood, County of Los Angeles, State of California. That for convenience [2*] said defendant will hereafter be referred to as "Republic" or "Defendant Republic."

III.

Plaintiff is informed and believes and therefore alleges that defendant, Hollywood Television Service, Inc., is a corporation duly organized and existing under the laws of the State of Delaware and is a citizen of said State, and is duly qualified to do business in the State of California, and is doing business in North Hollywood, County of Los Angeles, State of California. That said defendant will hereafter for convenience be referred to as "Hollywood Television" or "Defendant Hollywood Television."

IV.

Defendants Doe One, Doe Two, Doe Three, Doe Four, Doe Five, Doe Six, Doe Seven, Doe Eight, Doe Nine, and Doe Ten are citizens of States of the United States other than the State of California, and are agents, employees, associates, assignees or other persons claiming some interest in the subject matter of this action through the Defendant Republic.

V.

The amount in controversy herein exceeds the sum of Three Thousand Dollars, ($3,000.00), exclusive of interest and costs.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

VI.

Plaintiff has been for many years and now is an internationally known motion picture, stage, radio and rodeo star and has achieved great fame and prominence as an actor, singer, rodeo performer and equestrian, and has been for many years and now is well known throughout the United States and many foreign countries as "Roy Rogers." Plaintiff's fame as a western star has been and now is such that he has been for many years and now is known as "King of the Cowboys." Under his name Roy Rogers and as said Roy Rogers, plaintiff has through his performances and ability built up [3] great trust, confidence and esteem for himself in the mind of the public.

VII.

"Trigger" has been for many years and now is the name of the horse used by plaintiff in his profession and the name "Trigger" has been for many years and now is associated in the public mind exclusively with the plaintiff, Roy Rogers.

VIII.

For many years one of the plaintiff's principal businesses has been and it now is the business of licensing the manufacturers or distributors of various products and commodities (other than motion pictures) to use his name and likeness on a product or to use his name, voice and likeness and the name and likeness of Trigger, according to the desires and requirements of the particular manufacturer or

distributor but under the strict control of plaintiff, for the purpose of advertising and selling the product or products of such licensee. Plaintiff's said business of licensing has been for many years and now is producing for him a substantially greater income than he has received in like periods from rendering services in motion picture work. Said licensing business reached such proportions in the calendar year 1950, that plaintiff is informed by his licensees and believes and therefore alleges that gross sales of products (other than motion pictures and exclusive of the food products manufactured by his radio sponsor) bearing the name Roy Rogers or the name of his horse, Trigger, were in excess of Twenty Million Dollars ($20,000,000.00). For brevity and convenience plaintiff will hereinafter refer to all elements of said licensing business as "commercial advertising."

IX.

In said business of licensing the use of his name, voice or likeness and the name or likeness of his horse, Trigger, plaintiff has at all times exercised great care, diligence and discretion and [4] has at no time recommended or endorsed or permitted the use of his name, voice or likeness in connection with any goods or services, except those which the plaintiff believed in good faith to be of good quality, wholesome and suitable for safe purchase and use by the public.

X.

Between 1938, and the 27th day of May, 1951, said period being hereinafter referred to as the "term"

or "term of employment" plaintiff rendered services as the star male performer in approximately 85 motion pictures produced by defendant, Republic. In a majority of said motion pictures plaintiff's horse, Trigger, was also starred or featured. That although during said term, the defendant, Republic, had the right to utilize plaintiff's services in television productions or in the production, exhibition, or transmission of motion pictures by means of television devices, at no time during said term was plaintiff called upon or requested by defendant, Republic, to render any such services. On the contrary, such services as were requested by defendant, Republic, and rendered by plaintiff, were solely in connection with the making of the usual and customary motion pictures which were made for exhibition and display to the public upon payment of a fee or admission charge by members of the viewing public, and were not made nor were plaintiff's services rendered to defendant, Republic, for the purposes of commercial advertising.

XI.

At all times during the said term of his employment plaintiff asserted and exercised exclusive control over, and the exclusive right to receive any and all considerations received from, the use of his name, voice or likeness or the name or likeness of his horse, Trigger, in commercial advertising. Plaintiff further alleges that heretofore whenever anyone, including the defendants herein, has ever desired to use or authorize others to use his name [5] or voice

or likeness or the name or likeness of Trigger in any commercial advertising, said person or persons have always heretofore first requested the consent of plaintiff before making such use.

XII.

In addition to plaintiff's rights in commercial advertising, established by custom and practice during his early relations with the defendant, Republic, by a written Agreement, dated February 28, 1948, plaintiff expressly reserved and defendant, Republic, expressly acknowledged that plaintiff was to reserve and retain to himself the exclusive right to enter into commercial advertising contracts involving the use of plaintiff's name, voice or likeness or the name or likeness of his horse, Trigger, and was to receive the full proceeds from such commercial advertising. Plaintiff is informed by his counsel and believes and therefore alleges that defendant, Republic, by said Agreement, dated February 28, 1948, also impliedly covenanted to act in good faith toward plaintiff and not to do any act which would interfere with or unfairly compete with plaintiff's acknowledged right to use or authorize others to use his name, voice and likeness and the name and likeness of his horse, Trigger, in commercial advertising, and to receive the full proceeds from such commercial advertising.

XIII.

By a letter, dated June 8, 1951, the defendant, Hollywood Television, offered to various advertising agencies and to various television networks and

stations certain of the motion pictures heretofore produced by defendant, Republic, during the term of plaintiff's employment, and starring the plaintiff, Roy Rogers, and his horse, Trigger, for immediate televising for the purposes of commercial advertising. Said defendant, Hollywood Television, offered to license or sell said pictures to anyone in groups of 13, 26 or 52 for commercial advertising purposes and said offer contemplated that the name, voice and likeness of Roy Rogers and the name [6] and likeness of his horse, Trigger, would be regularly, repetitiously and systematically used, broadcast and shown to the viewing and listening public free of charge on television screens for the express and only purpose of selling the product or products of the sponsor of said program; and said offer also contemplated similar systematic and repetitious use in newspapers and other advertising media regularly and customarily used to advertise a sponsor's program and the products advertised thereon. Such regular and systematic use and repetition of the name, voice and likeness of plaintiff with the name and advertising material of the sponsor's product or products will cause plaintiff's name, voice and likeness to be associated in the public mind with said product or products and its effect will be to mislead the public into believing that plaintiff endorses, approves or recommends the said product or products.

XIV.

On Tuesday, June 19, 1951, defendant, Hollywood Television, held a screening in the nature of a "pre-

view" at the studios of defendant, Republic, at North Hollywood, California, at which time it reiterated said offer to sell or license the name, voice or likeness of plaintiff in connection with the commercial advertising of the product or products of the person or persons to be so licensed.

XV.

By a letter, dated June 20, 1951, and delivered to said defendants and their counsel on June 21, 1951, plaintiff demanded that said defendants, Republic and Hollywood Television, forthwith withdraw said offers hereinabove referred to. Said defendants have refused to comply with the demand set forth in plaintiff's said letter and have expressed their intention of continuing to offer and negotiate for the sale or licensing of plaintiff's name, voice and likeness and the name and likeness of his horse, Trigger, in [7] connection with commercial advertising on television.

XVI.

The motion pictures which were produced by defendant, Republic, during the term of plaintiff's employment by defendant, Republic, were not produced for, and in their original form as released to the public were not suitable for telecasting for commercial advertising purposes, and in order to render them suitable for commercial advertising purposes, and pursuant to the plan of defendants to utilize plaintiff's name, voice and likeness and the name and likeness of his horse, Trigger, in connection with commercial advertising, the defendant, Republic, and the defendant, Hollywood

Television, or one of them, have caused or are offering to cause the said motion pictures starring plaintiff and his horse Trigger, to be shortened and abbreviated to a length of only 53½ minutes so as to permit the insertion in a one-hour television program of approximately 6½ minutes of advertising material for the purpose of advertising the product of the sponsor of such television program.

XVII.

Said offers of said defendants, Republic and Hollywood Television, were not made until after plaintiff's term of employment ended and were made at a time when plaintiff was engaged in negotiations for a contract with third parties whereby he would appear on television for the purposes of commercial advertising. Said offers of said defendants were made and are now being made wilfully and in complete disregard of plaintiff's rights and with the knowledge that such offers would and will continue to interfere with and damage plaintiff's profession and commercial advertising business and are a wrongful and malicious threat and attempt to deprive plaintiff of the normal and expected fruits of his commercial advertising business, and are a wilful and malicious attempt to divert normally expected profits from plaintiff to said defendants. Plaintiff further alleges that the actual use of said motion pictures, starring [8] plaintiff and his horse, Trigger, for the purposes of commercial advertising, without the consent of plaintiff, will inflict great and irreparable injury upon plaintiff and will

prevent or substantially hinder the plaintiff's business of licensing his name, voice and likeness for use in connection with commercial advertising and will prevent or hinder him from selling his personal services on television in connection with commercial advertising and will further inflict great and irreparable injury upon plaintiff in that the commercial value of plaintiff's recommendation, endorsement or approval for advertising purposes will be destroyed or substantially diluted. Further great and irreparable injury will be inflicted upon plaintiff if defendants are permitted to follow their present course of conduct, in that plaintiff's name and reputation and the public's trust, confidence and admiration for plaintiff and for his horse, Trigger, will be subjected to jeopardy in that plaintiff's name, voice and likeness and the name and likeness of his horse, Trigger, will be associated and used for the purpose of selling products over the type, quality and character of which plaintiff will have no control.

XVIII.

That the said defendants publicly announced offer and intent to sell, license and permit the use of plaintiff's name, voice and likeness for the purpose of advertising the products of a prospective purchaser, licensee or sponsor, are and will constitute unjust and unfair competition with this plaintiff and a wilful and malicious violation of plaintiff's long acknowledged and well established exclusive right freely to engage in the business of commercial advertising and is inflicting and will continue to

inflict great and irreparable damage upon plaintiff, unless restrained by this Court. [9]

XIX.

By its acquiescence, representations, and conduct over a long period of years, the defendant, Republic, has waived any right or authority it might otherwise have had or claimed to have had, to use or authorize others to use the name, voice or likeness of the plaintiff or the name or likeness of his horse, Trigger, in connection with the advertising of any product save and except the motion pictures produced by said defendant and starring the plaintiff.

XX.

By its acquiescence, representations and conduct over a long period of years, the defendant, Republic, led, encouraged and permitted plaintiff to believe that he had the sole and exclusive right to use and to authorize others to use his name, voice and likeness and the name and likeness of his horse, Trigger, for the purposes of commercial advertising and that said defendant, Republic, made no claim to any such right or authority and plaintiff believed and relied upon said representations, acquiescence and conduct and in reliance thereon has heretofore over a period of many years entered into or authorized others to enter into numerous valuable contracts with third parties, authorizing them to use his name, voice or likeness or the name or likeness of Trigger in connection with either the name of the licensee's product or the advertising thereof,

and plaintiff alleges further that now to permit said defendant to assert any right to use plaintiff's name or likeness or the name or likeness of his horse, Trigger, in connection with the advertising of any product (except the motion pictures starring plaintiff and Trigger and produced by said defendant) would cause plaintiff and his said licensees great, immediate, and irreparable damage, for all of which reasons said defendant, Republic, as well as its subsidiary defendant, Hollywood Television, are and each of them is estopped now to claim or assert any right or authority which they might [10] otherwise have had or claimed to have had with respect to the use of plaintiff's name, voice or likeness or the name or likeness of his horse, Trigger, in connection with the advertising of any product save and except the motion pictures produced by said defendant and starring the plaintiff and his horse, Trigger.

XXI.

Plaintiff is informed and believes and therefore alleges that defendant, Hollywood Television, is a wholly owned subsidiary of and an agent and instrumentality of defendant, Republic, and has at all times had full notice and knowledge of plaintiff's exclusive right to control and receive the fruits of the use of his name, voice and likeness and the name and likeness of his horse, Trigger, in commercial advertising, and likewise had full notice and knowledge of the fact that defendant, Republic, had no right or authority to use or permit others to

use plaintiff's name, voice or likeness or the name and likeness of his horse, Trigger, in commercial advertising, without the specific consent and authority of plaintiff first had and obtained. Plaintiff has never authorized or licensed or consented to the said Hollywood Television's use of his name, voice or likeness or the name and likeness of his horse, Trigger, in commercial advertising, or for any other purpose, nor has he ever authorized, licensed or consented to said defendant's authorizing, licensing or consenting to others so using his name, voice or likeness or the name or likeness of his horse, Trigger.

XXII.

Said defendants, Republic and Hollywood Television, are threatening to consummate a sale or licensing of plaintiff's name, voice and likeness and the name and likeness of his horse, Trigger, for commercial advertising purposes, as soon as possible after Sunday, June 24, 1951, for which reason plaintiff is without any adequate remedy at law and great, immediate and irreparable injury, loss and damage will result to plaintiff unless injunctive relief is promptly granted. [11]

XXIII.

That the above-mentioned threats of defendants, Republic and Hollywood Television, to authorize third persons to use plaintiff's name, voice and likeness and the name and likeness of his horse, Trigger, in commercial advertising, all without the consent of plaintiff and in derogation of his rights,

has already substantially damaged plaintiff in that, as plaintiff is informed and believes and therefore alleges, said threats were a proximate and contributing cause of the failure of plaintiff's radio sponsor to renew plaintiff's radio contract. Said contract ran from August, 1948, to and including mid May, 1951, and plaintiff is informed and believes and therefore alleges that his services thereunder were entirely satisfactory, and that except for said threats by said defendants said radio contract would have been renewed and that he would have continued to receive substantial compensation therefrom. Said threats have also caused other radio and television advertising sponsors to be fearful of the competition inherent in said defendants' offers and have been and now are hindering and interfering with plaintiff's negotiations for a contract or contracts with respect to radio and television, all to plaintiff's damage to date in the sum of $25,000. Said threats of defendants, if permitted to continue, even though not actually carried out, will continue to substantially damage plaintiff in his radio, commercial advertising, and contemplated television business, and in additional amounts not now susceptible of ascertainment.

XXIV.

As hereinabove alleged, the acts of the defendants in threatening to offer and offering to license or permit others to use plaintiff's name, voice and likeness and the name and likeness of his horse, Trigger, in commercial advertising, have been com-

mitted and are being committed wilfully and maliciously and for the purpose of [12] damaging and injuring plaintiff in his profession and lawful business, for which reason plaintiff asks that damages by way of example be assessed against defendant, Republic, in the amount of $50,000 and against defendant, Hollywood Television, in the amount of $25,000 as and for exemplary damages.

Wherefore, plaintiff prays:

(1) That a temporary restraining order issue at once, restraining defendants, Republic Productions, Inc., and Hollywood Television Service, Inc., and each of them, and their respective officers, agents, servants, employees, and attorneys, and all persons in concert or participation with them or any of them, from in any manner using, leasing, selling, licensing or disposing of or permitting others to use, for advertising purposes, the name or voice or likeness of the plaintiff, Roy Rogers, or the name or likeness of his horse, Trigger, or any motion picture or motion pictures in which said name or voice or likeness of Roy Rogers or the name or likeness of his horse, Trigger, appear, except for the limited purpose of advertising said motion picture or motion pictures; and

(2) That a preliminary injunction issue, on motion and hearing, restraining said defendants, Republic Productions, Inc., and Hollywood Television Service, Inc., and each of them, and their respective officers, agents, servants, employees, and attorneys, and all persons in concert or participation with

them or any of them, from committing or permitting said acts and each of them referred to in Paragraph (1) of this prayer, pending the final determination of this cause; and

(3) That upon the final determination of this cause, said defendants, Republic Productions, Inc., and Hollywood Television Service, Inc., and each of them, and their respective officers, agents, servants, employees, and attorneys, and all persons in concert or participation with them or any of them be permanently restrained and enjoined from committing or permitting said acts and each of [13] them referred to in Paragraph (1) of this prayer; and

(4) That the defendants, Republic Productions, Inc., and Hollywood Television Service, Inc., and each of them be required to pay over to plaintiff any and all sums which they have received or shall hereafter receive from the use, sale, lease, licensing or other disposition of the name, voice or likeness of plaintiff, Roy Rogers, or the name or likeness of his horse, Trigger, for commercial advertising purposes, or from the use, sale, lease, licensing or other disposition for commercial advertising purposes, of any motion pictures in which said name, voice or likeness of plaintiff, Roy Rogers, or said name or likeness of said horse, Trigger, appear; and

(5) For damages in the amount of $25,000 and additional damages, by way of example, in the

amount of $50,000 from defendant, Republic Productions, Inc., and $25,000 from defendant, Hollywood Television Service, Inc.; and

(6) That plaintiff have and recover his costs herein incurred; and

(7) For such other and further relief as to the Court may seem just and proper in the premises.

Dated June 22, 1951.

GIBSON, DUNN & CRUTCHER,
FREDERIC H. STURDY,
RICHARD H. WOLFORD,
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff.

Duly verified.

Receipt of Copy attached.

[Endorsed]: Filed June 23, 1951. [14]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS

Defendants Republic Productions, Inc., (hereinafter for convenience referred to as "Productions"), Hollywood Television Service, Inc., (hereinafter for convenience referred to as "Hollywood"), and Republic Pictures Corporation (sued herein as Doe One, and hereinafter for convenience referred to as "Pictures") answer the complaint on file herein as follows:

I.

At all times material herein Pictures has been and is a corporation duly organized and existing under and by virtue of the laws of the State of New York, qualified to transact and transacting business in the State of California and within the Southern District of said state. [16] At all of said times Productions and Hollywood have been and are wholly owned subsidiaries of Pictures.

II.

Deny the allegations contained in Paragraphs IV, XI, XVIII, XIX, XX, XXI and XXIV of the complaint.

III.

Admit that plaintiff has been for many years and now is an internationally known actor of so-called "western" roles in motion pictures and other forms of entertainment and that, since some time subsequent to 1937, he has been and now is known as "Roy Rogers." In that connection defendants allege that said name was adopted by plaintiff at the instance and with the consent of Productions after he had been employed as an actor by Productions, his true name then and for some time thereafter being Leonard Slye; and that the identification of plaintiff in the public mind as Roy Rogers is due to, and has in large part been brought about by, extensive advertising and exploitation of plaintiff, his assumed name and the motion pictures in which he has appeared, carried on by Productions and Pictures at great cost and expense to them, and by the

merit and excellence of the motion pictures produced and distributed by Productions and Pictures in which plaintiff appeared. Except as hereinabove expressly admitted defendants are without information or knowledge sufficient to form a belief as to the truth of the averments of Paragraph VI of the complaint.

IV.

Admit and allege that the name "Trigger" is a name used by plaintiff for several horses which he uses in his business as an actor. Except for such admission defendants are without information or knowledge sufficient to form a belief as to the truth of the averments of Paragraph VII of the complaint.

V.

Defendants are without information or knowledge sufficient [17] to form a belief as to the truth of the averments of Paragraphs VIII and IX of the complaint.

VI.

Admit and allege that on or about October 13, 1937, Productions and plaintiff entered into a contract in writing under and by virtue of which Productions employed plaintiff to render his exclusive services as an actor; and that on or about February 28, 1948, said parties entered into another contract in writing under and by virtue of which Productions employed plaintiff to render his services as an actor. Each of said contracts was amended or supplemented from time to time. True and correct copies of said contracts and the amend-

ments and supplements thereto are attached hereto, marked Exhibits "A," "B," "C," "D" and "E," respectively, and by this reference incorporated herein. The employment created by said contracts ended on or about May 25, 1951. Plaintiff rendered his services as an actor pursuant to the 1937 contract in 63 photoplays and pursuant to the 1948 contract in 18 photoplays. Each of said photoplays and all rights therein and thereto were transferred to Pictures and duly copyrighted under the copyright laws of the United States by Pictures. At all times since Pictures has been and is now the owner of said photoplays, of the copyright thereof, and of all other rights therein and thereto, including the right to exhibit, reproduce and transmit, and to license others to exhibit, reproduce and transmit, any or all of said photoplays in any manner or by any method. Except for the foregoing admissions, defendants deny the allegations of Paragraphs X and XII of the complaint.

VII.

Admit and allege that on or about June 8, 1951, Hollywood offered in writing to various advertising agencies to license certain of the above-mentioned photoplays for exhibition by television. A true and correct copy of one of said offers is attached hereto, [18] marked Exhibit "F" and by this reference incorporated herein. Said offers were all in substantially the same form. Said offers were made with the authority and consent of Pictures and Productions. Except for the foregoing admissions

defendants deny the allegations of Paragraphs XIII and XIV of the complaint.

VIII.

Admit and allege that on or about June 21, 1951, plaintiff demanded that Productions and Hollywood withdraw said offers; that defendants have refused to do so; that defendants intend to offer and negotiate for the licensing of said photoplays for exhibition by television and in any other manner and by any other method in or by which said photoplays may be exhibited, reproduced and transmitted; and that defendants intend to retain, reserve and use and exercise any and all rights in said photoplays which they have. Except for the foregoing admissions, defendants deny the allegations of Paragraphs XV and XXII of the complaint.

IX.

Admit that certain of said photoplays have been or are being shortened so as to be capable of being exhibited in about 53½ minutes. Except for the foregoing admission defendants deny the allegations of Paragraph XVI of the complaint.

X.

Admit that said offers were made after plaintiff's term of employment had ended. Defendants are without information or knowledge sufficient to form a belief as to the truth of the averment that plaintiff was engaged in negotiating for a contract with third parties whereby he would appear on television. Except for the foregoing admission and

allegation of want of information or knowledge, defendants deny the allegations of Paragraph XVII of the complaint.

XI.

Deny that defendants have, or any of them has, made any threats whatever or that any act or statement of defendants, or any [19] of them, has damaged or injured, or will damage or injure, plaintiff in any way or in any amount whatsoever. Except for the foregoing denial, defendants are without information or knowledge sufficient to form a belief as to the truth of the averments of Paragraph XXIII of the complaint.

XII.

The complaint does not state facts sufficient to constitute a claim.

Wherefore, defendants pray judgment that plaintiff take nothing by reason of his said complaint, that said complaint be dismissed on the merits, with defendants' costs incurred herein, and for such other and further relief as to the court may seem proper.

LOEB AND LOEB,
By /s/ HERMAN F. SELVIN,
Attorneys for Defendants.

EXHIBIT A

Republic Productions, Inc.

Agreement executed at North Hollywood, California, October 13, 1937, by and between Republic Productions, Inc., a New York corporation, hereinafter referred to as the "producer," and Leonard Slye, hereinafter referred to as the "artist,"

Witnesseth

For and in consideration of the covenants, conditions and agreements hereinafter contained and set forth, the parties hereto have agreed and do hereby agree as follows:

1. The producer hereby employs the artist to render his exclusive services as herein required for and during the term of this agreement and the artist hereby accepts such employment and agrees to keep and perform all of the duties, obligations and agreements assumed and entered into by him hereunder.

2. The artist agrees that throughout the term hereof he will render the services hereinafter specified, solely and exclusively for and as requested by the producer; that he will render his services as an actor in such roles and in such photoplays and/or other productions as the producer may designate; that he will make personal appearances in motion picture theatres and/or other places of entertainment and/or will render his services as an actor in vaudeville, plays and/or in all other kinds of performances on the speaking stage; that he will render

his services as a radio performer, not only by broadcasting in person, but also by making electrical transcriptions and/or by any other present or future methods or means; that he will render his services as an actor in television productions; and that he will render his services in connection with the broadcasting and/or transmission of his likeness and/or voice by means of television, radio and/or otherwise, whether such broadcasting and/or transmission be either directly or indirectly in connection with or independent of photoplays. The artist further agrees that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection with the services to be performed by the artist hereunder; and that he will perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer. The term "photoplays" as used in this agreement shall be deemed to include, but not be limited to, motion picture productions produced and/or exhibited and/or transmitted with sound and voice recording, reproducing and/or transmitting devices, television, radio devices and all other improvements and devices which are now or hereafter may be used in connection with the production and/or exhibition and/or transmission of any present or future kind of motion picture productions.

3. The artist further agrees that during the term hereof he will not render his services as an actor, or pose, act, appear, write, direct or render any other services in any way connected with motion pictures or photoplays, nor will he render any services of any kind or character whatsoever, in any way connected with dramatic, theatrical, musical, vaudeville, radio, television or other productions, shows, performances and/or entertainment, nor will he render any other similar services to or for himself, or to or for any person, firm or corporation other than the producer, without the written consent of the producer first had and obtained. The artist further agrees that he will not consent to nor permit any other person to advertise, announce or make known, directly or indirectly, by paid advertisements, press notices, or otherwise, that he has contracted to do or perform any act or services contrary to the terms of this agreement. The producer shall have the right to institute any legal proceedings, in the name of the artist or otherwise, to prevent such acts, or any of them.

4. The artist expressly gives and grants to the producer the sole and exclusive right to photograph and/or otherwise reproduce any and all of his acts, poses, plays and appearances of any and all kinds during the term hereof, and to record his voice and all instrumental, musical and other sound effects produced by him, and to reproduce and/or transmit the same, either separately or in conjunction with such acts, poses, plays and appearances, as the

producer may desire; and further gives and grants to the producer solely and exclusively all rights of every kind and character whatsoever in and to the same, or any of them, perpetually, including as well the perpetual right to use the name of the artist and pictures or other reproductions of the artist's physical likeness, and recordations and reproductions of the artist's voice, in connection with the advertising and exploitation thereof, as well as in connection with the advertising and/or exploitation of any other services which may be required of the artist hereunder. The producer shall have the right to "dub" the voice of the artist and all instrumental, musical and/or other sound effects to be produced by the artist to such extent as may be desired by the producer, such dubbing of the artist's voice to be in English and/or in any other language or languages designated or desired by the producer. The producer shall also have the right to use a "double" for the acts, poses, plays and appearances of the artist to such extent as may be desired by the producer. The artist does also hereby grant to the producer, during the term hereof, the sole and exclusive right to make use of, and to allow others to make use of, his name for advertising, commercial and/or publicity purposes (other than in connection with the acts, poses, plays and appearances of the artist hereunder), as well as the sole and exclusive right to make use of and distribute, and to allow others to make use of and distribute, his pictures, photographs or other reproductions of his physical likeness and of his voice

for like purposes. The artist shall at no time during said term grant the right to, authorize or willingly permit any person, firm or corporation other than the producer to make use of his name or to make use of or distribute his pictures, photographs or other reproductions of his physical likeness or of his voice, and authorizes the producer, in the name of the artist or otherwise, to institute any proper legal proceedings to prevent such acts, or any of them.

5. The artist agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.

6. The artist hereby expressly gives and grants to the producer the right to lend the services of the artist to any other person or persons, in any capacity in which the artist is required to render his services hereunder, upon the distinct understanding and condition, however, that this contract shall, nevertheless, continue in full force and effect and that the artist shall not be required to do any act or perform any services contrary to the provisions of this agreement. Any breach by any such person, however, of any of the terms of this [21] agreement shall not constitute a breach by the producer of its

obligations or covenants under this agreement, nor shall the artist have the right to terminate this agreement by reason of any such breach by any such person, but the artist, at his option, in the event of such breach by any such person, shall be released from the obligation to render further services to such person. In the event that the artist is required to render services for any other person or persons as hereinabove provided, he agrees to render the same to the best of his ability. Should the services of the artist be loaned to any other person or persons hereunder, such other person or persons, at the option of the producer, shall be entitled to all or any of the advertising and other rights in connection with services rendered by the artist for such other person or persons as are given to the producer under the terms of this agreement.

7. In the event that the producer desires, at any time or from time to time, to apply, in its own name, or otherwise, but at its own expense, for life, health, accident or other insurance covering the artist, the artist agrees that the producer may do so and may take out such insurance for any sum which the producer may deem necessary to protect its interests hereunder. The artist shall have no right, title or interest in or to such insurance, but agrees, nevertheless, to assist the producer in procuring the same by submitting to the usual and customary medical and other examinations and by signing such applications and other instruments in writing as may reasonably be required by such insurance company or companies.

8. In the event that by reason of mental or physical disability, or otherwise, the artist shall be incapacitated from fully performing the terms hereof or complying with each and all of his obligations hereunder, or in the event that he suffer any facial or physical disfigurement materially detracting from his appearance on the screen or interfering with his ability to perform properly his required services hereunder, or in the event that his present facial or physical appearance be materially altered or changed, or in the event that he suffer any impairment of his voice, then in either or any of said events this agreement shall be suspended during the period of such disability or incapacity or facial or physical disfigurement or change of present facial or physical appearance, or impairment of voice, and no compensation need be paid the artist during the period of such suspension. The term of this agreement, and all of its provisions herein contained, may be extended, at the option of the producer, for a period equivalent to all or any part of the period of such suspension. The producer, at its option, in the event of the continuance of such disability or incapacity or facial or physical disfigurement or change of present facial or physical appearance or impairment of voice for a period or aggregate of periods in excess of three (3) weeks during the term hereof, may cancel and terminate this employment. The producer shall have the right, at its option, to have medical examinations of the artist made at any time and from time to time by such

physician or physicians as the producer may designate.

9. In the event that at any time during the term hereof the producer, or any person to whom the services of the artist are loaned by the producer hereunder, should be materially hampered, interrupted or interfered with in the preparation, production or completion of photoplays by reason of any fire, casualty, lockout, strike, labor conditions, unavoidable accident, riot, war, act of God, or by the enactment of any municipal, state or federal ordinance or law, or by the issuance of any executive or judicial order or decree, whether municipal, state or federal, or by any other legally constituted authority, or by any national or local emergency or condition, or by any other cause of the same or any similar kind or character, or if by reason of the illness or incapacity of any principal member of the cast (other than the artist) or of the director of any photoplay in which the artist is rendering or is scheduled to render services, the production of such photoplay is suspended, interrupted or postponed, or if for any reason whatsoever the majority of the motion picture theatres in the United States shall be closed for a week or any period in excess of a week, then and in any of said events this agreement, at the option of the producer, may be suspended, likewise, during the continuance of such event or events, and no compensation need be paid the artist during the period of such suspension, and the term of this agreement, at the option of the

producer, may be continued and extended, upon the same terms and conditions as shall then be operative hereunder, for a period equivalent to all or any part of any period or periods during which any such event or events shall continue. If such suspension or suspensions or any such event or events should continue for a period or aggregate of periods in excess of twelve (12) weeks during the term hereof, then and in that event the producer, at its option, may cancel and terminate the artist's employment hereunder. If such suspension or suspensions should continue for a period or aggregate of periods in excess of twelve (12) weeks during the term hereof when the rate of compensation hereunder is One Hundred Fifty Dollars ($150.00) a week or more, the artist, at his option, may elect to terminate the artist's employment hereunder; provided, however, that should the artist desire to elect to terminate his employment he shall serve notice of such desire upon the producer, and if the producer should not resume the payment of the weekly compensation hereinafter specified, commencing as of not later than one (1) week after the receipt of such notice from the artist, then and in that event the employment of the artist hereunder shall be terminated. If the producer should resume the payment of such compensation, commencing as of not later than one (1) week after the receipt of such notice, then and in that event the employment of the artist hereunder shall not be terminated, but shall continue in full force and effect. The provisions of the next succeeding sentence of this Paragraph 9 shall be

deemed to be a part of this contract during and only during any period in which the rate of compensation hereunder is less than One Hundred Fifty Dollars ($150.00) per week. During any contract period in which the rate of compensation hereunder is less than One Hundred Fifty Dollars ($150.00), per week, any suspension or suspensions pursuant to the provisions of this Paragraph 9 shall be limited to four (4) weeks; provided, however, that the producer shall have the right to continue such suspension from week to week, not exceeding eight (8) additional weeks, but during such suspension in excess of four (4) weeks the producer shall pay the artist compensation hereunder at a rate equal to one-half (½) the rate of compensation herein provided for with respect to the term or period in which such suspension in excess of four (4) weeks occurs.

10. The artist warrants and represents to the producer and agrees that the artist is and shall be a member in good standing of Screen Actors Guild, Inc., and will remain so for the duration of this contract.

11. Notwithstanding anything elsewhere contained herein, it is expressly agreed that if at the time of the expiration of this agreement the artist is engaged in a photoplay or photoplays or in the rendition of any of his other required services hereunder, and if the producer shall not then have exercised an option for the further services of the artist for a further period, then and in that event

the artist's employment hereunder, at the option of the producer, may be continued and extended, at the same rate of salary and upon the same conditions as shall be operative hereunder immediately prior to the time of such expiration, until the completion of such of the artist's required services hereunder as the producer may desire in connection therewith, not exceeding sixty (60) days. If, after the expiration of this employment, the producer should desire the services of the artist in making retakes, added scenes, sound track, or any change or changes in any photoplay in which the [22] artist shall have appeared during his employment hereunder, then and in either of said events the artist agrees to render such services in connection therewith as and when the producer may request, unless the artist is otherwise employed, but if otherwise employed the artist will cooperate to the fullest extent in the making of such retakes, added scenes, sound track and/or changes, and for services actually rendered in the making thereof the artist shall be paid at the same rate of compensation as the artist was receiving immediately prior to the expiration of this employment, except that such compensation shall be paid only for the days on which the artist is actually so employed.

12. It is distinctly understood and agreed by and between the parties hereto that the services to be rendered by the artist under the terms hereof, and the rights and privileges granted to the producer by the artist under the terms hereof, are of a special,

unique, unusual, extraordinary and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and that a breach by the artist of any of the provisions contained in this agreement will cause the producer irreparable injury and damage. The artist hereby expressly agrees that the producer shall be entitled to injunctive and other equitable relief to prevent a breach of this agreement by the artist. Resort to injunctive and other equitable relief, however, shall not be construed as a waiver of any other rights that the producer may have in the premises, for damages or otherwise. In the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at its option, shall have the right to cancel and terminate this employment, may refuse to pay the artist any compensation during the period of such failure, refusal or neglect on the part of the artist, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues. If, at the time of such failure, refusal or neglect, the artist shall have been cast to portray a role in a photoplay, or shall have been directed to render any other of his required services hereunder, then and in either of said events the producer shall have the right to refuse to pay the artist any compensation during the time which would have been reasonably

required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time or for any portion thereof. Should the producer notify the artist that the artist has been cast to portray a role in a photoplay or to perform any other of his required services hereunder, and should the artist thereupon or at any time prior to the designated date of commencement of the rendition of such services advise the producer that the artist does not intend to render such services, the producer shall thereupon or at any time thereafter have the right to refuse to pay the artist any compensation commencing as of the date on which the artist has so advised the producer of his intent not to perform, or, at the producer's election, as of any time thereafter, and continuing until the expiration of the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or of such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for

a like period of time or for any portion thereof. Any period during which the producer is entitled to refuse to pay compensation to the artist pursuant to any of the provisions of this paragraph shall, unless sooner terminated, end if and when the artist shall be requested by the producer to and shall render other services hereunder. The producer shall also have the right, at its option, to extend the term of this agreement and all of its provisions for a period of time equivalent to all or any part of any leave or leaves of absence granted the artist by the producer during the term hereof. Each and all of the several rights, remedies and options of the producer contained in this agreement shall be construed as cumulative and no one of them as exclusive of the others or of any right or priority allowed by law. All options granted to the producer herein for extending the term of this agreement, other than the options hereinafter in Paragraph 23 specifically set forth, may be exercised by the producer by notice in writing to be served upon the artist at any time prior to the expiration of the term hereof.

13. If this agreement be suspended or if the producer refuse to pay the artist compensation, pursuant to any right to do so herein granted to the producer, or if the producer grant any leave of absence to the artist, and if in connection with such suspension, refusal to pay or leave of absence, the producer shall exercise the right to extend this agreement for a period equivalent to all or any part

of the period of such suspension, refusal to pay or leave of absence, then and in that event the running of the then current term or period of the artist's employment hereunder shall be deemed to be interrupted during the period of such suspension, refusal to pay or leave of absence, but shall be resumed immediately upon the expiration of such suspension or leave of absence or (in case of any such refusal to pay) upon the resumption of the payment of compensation, and (subject to subsequent extension or termination for proper cause) shall continue from and after the date of such resumption for a period equal to the unexpired portion of such term or period at the time of the commencement of such suspension, refusal to pay or leave of absence, less a period equal to that portion, if any, of the period of such suspension, refusal to pay or leave of absence, for which the producer does not exercise the right to extend this agreement. In the event of any such extension the dates for the exercise of any subsequent options and the dates of the commencement of any subsequent optional period or periods of employment hereunder shall be postponed accordingly. During the period of any such suspension, refusal to pay or leave of absence the artist shall not have the right to render his services to or for any person, firm or corporation other than the producer without the written consent of the producer first had and obtained. Should the producer pay any money or compensation to the artist for or during all or any part of any period in which this agreement is suspended, or in which the

artist is not entitled to compensation, or in which the producer is entitled to refuse to pay compensation to the artist, then and in that event, at the option of the producer, the money and/or compensation so paid the artist shall be returned by the artist to the producer on demand, or the same may be deducted by the producer from any compensation earned hereunder by the artist after such period, but this provision shall not be deemed to limit or exclude any other rights of credit or recovery, or any other remedies, the producer otherwise may have. Wherever in this agreemnt reference is made to the phrases "the term hereof," "the term of this agreement," or other phrases of like tenor, such references (unless a different meaning clearly appears from the context) shall mean and be deemed to refer to the original period of the artist's employment hereunder and/or to whichever of the optional periods of employment provided for in Paragraph 23 hereof may be current at the time referred to.

14. No waiver by the producer of any breach of any covenant or provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision.

15. All notices which the producer is required or may desire to serve upon the artist under or in connection with this agreement may be served by addressing the same to the artist at such address as may be designated [23] from time to time in

writing by the artist, or if no such address be designated in writing by the artist, or, if having designated an address, the artist cancels the same and fails to designate a new address, then by addressing the same to the artist at any place where the producer has a studio or an office and, in any case, by depositing the same so addressed, postage prepaid, in the United States mail, or by sending the same so addressed by telegraph or cable, or, at its option, the producer may deliver the same to the artist personally, either in writing or, unless otherwise specified herein, orally. If the producer elect to mail such notice or to send the same by telegraph or cable, then the date of mailing thereof, or the date of delivery thereof to the telegraph or cable office, as the case may be, shall be the date of the service of such notice.

16. Nothing in this contract contained shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this agreement and any material statute, law or ordinance contrary to which the parties have no legal right to contract, the latter shall prevail, but in such event the provision of this agreement affected shall be curtailed and limited only to the extent necessary to bring it within the legal requirements.

producer

17. The artist agrees to furnish all modern wardrobe and wearing apparel necessary for any and all roles to be portrayed by the artist hereunder; it

being agreed, however, that should so-called "character" or "period" costumes be required the producer shall supply the same. It is distinctly understood and agreed, however, that in no event shall the producer be required to furnish shoes, hosiery, or underclothing for the artist; but the artist shall supply at his own expense all shoes, hosiery and underclothing (other than "character" or "period" shoes, hosiery or underclothing) necessary for any and all roles to be portrayed by him hereunder. All costumes, apparel, and other articles furnished or paid for by the producer pursuant to the terms of this agreement, or otherwise, shall be and remain the property of the producer and shall be returned promptly to it.

18. The services of the artist hereunder are to be rendered at such place or places as may from time to time be designated by the producer. When the artist is required to render his services on location the producer agrees to furnish such necessary and reasonable meals and transportation as may reasonably be required for the artist during and on account of the rendition of such services and where, in the judgment of the producer, it is necessary for the artist to remain on such location overnight, the producer agrees to furnish necessary lodging for the artist. The artist shall not be deemed to be on location when rendering services at or near the studio then generally used by the producer as the base for the production of its photoplays.

19. The artist expressly agrees that until the

expiration of the term hereof he will be available at all times in Los Angeles, California, or any other place the producer may designate, unless excused in writing by the producer. The artist further agrees that if and when requested by the producer to do so, he will report at the producer's studio, or at any other place the producer may designate, for wardrobe fittings, publicity interviews, publicity photograph sittings, making tests and/or "stills," and for such discussions as the producer may deem necessary or desirable; it being understood, however, that no compensation whatsoever shall be or become payable to the artist for the compliance by the artist with such request of the producer; provided, however, that if the artist shall be required to render any services as aforesaid for the producer during any period or periods in which the rate of compensation hereunder is less than One Hundred Fifty Dollars ($150.00) per week, the artist shall be paid therefor on the same basis and at the same rate as herein elsewhere provided.

20. Where necessary herein, all terms used in the masculine gender shall apply to the feminine gender.

21. The producer may transfer or assign all or any part of its rights hereunder to any person, firm or corporation, and this agreement shall inure to the benefit of the producer, its successors or assigns.

22. On condition that the artist shall fully and completely keep and perform each and every term

and condition of this agreement on his part to be kept or performed, the producer agrees to compensate the artist therefor and for all rights herein granted and/or agreed to be granted by the artist to the producer at the rate of Seventy-Five and No/100 Dollars ($75.00) per week, payable for each week during which the artist shall have actually rendered his services hereunder (other than as provided in Paragraph 19 hereof) either in connection with the production of a photoplay or photoplays or in the performance of any of his other required services hereunder. Conditioned as aforesaid, the producer agrees that compensation will be paid to the artist for a period or aggregate of periods of not less than twenty (20) weeks during the original term hereof and for a period or aggregate of periods of not less than twenty (20) weeks during each six (6) months optional period of employment for which an option is exercised hereunder, and for a period or aggregate of periods of not less than forty (40) weeks during each one (1) year optional period of employment for which an option is exercised hereunder; provided, however, that the foregoing shall be deemed to have been fully complied with in any year of this agreement for which compensation shall be paid to the artist for a period or aggregate of periods of forty (40) weeks. In computing compensation to be paid or deducted with respect to any period of less than a week, the weekly rate shall be prorated, and for this purpose the rate per day shall be one-sixth (1/6) of the

weekly rate. For the purposes of this paragraph the term "year of this agreement" shall be deemed to mean any period of three hundred sixty-five (365) consecutive days. If during the original term hereof or during any optional period of employment for which an option is exercised hereunder, this agreement be suspended, pursuant to any provision for suspension herein contained, or if the producer refuse to pay the artist compensation pursuant to any right to do so herein granted to the producer, then the minimum periods hereinabove specified, during which the producer is obligated to pay compensation to the artist, shall be reduced by a period equivalent to the period or aggregate of periods of such suspension or suspensions or refusal to pay. Any compensation due the artist hereunder shall be payable on Thursday of each week for services rendered up to and including the Wednesday preceding. During any period or periods in which the artist is not entitled to compensation pursuant to the provisions of this paragraph, he shall be deemed to be laid off without pay, and during such periods, of course, the artist shall not have the right to render his services for any person, firm or corporation without the written consent of the producer first had and obtained. Any such layoff of the artist shall be for a period of at least one (1) consecutive week, subject to recall for retakes and added scenes, but if there remains insufficient time at the end of the term hereof to lay the artist off for a period of at least one (1) consecutive week during the balance of said term, the

producer may, nevertheless, lay off the artist for the remaining unexpired balance of said term even though such balance be less than one (1) week. During any such layoff period the producer may recall the artist for retakes and added scenes. For the purposes of the preceding two sentences any period or periods during which the artist is not entitled to compensation pursuant to the provisions of Paragraphs 8, 9 or 12 hereof shall not be deemed to be layoff periods.

22½. The artist agrees

23. The term of employment hereunder shall commence on October 13, , 19 37, and shall continue for a period of - - Six months - - - - - - - (- 6 -) from and after said date.

In consideration of the execution of this agreement by the producer and of the consent of the producer to the amount of compensation herein set forth, the artist hereby gives and grants to the producer the following rights or options:

(a) To extend the term of employment of the artist for an additional period of six (6) months from and after the expiration of the term hereinbefore specified, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this first extended period at the rate of One Hundred Twenty-five Dollars ($ 125.00) per week.

(b) To extend the term of employment of the artist for an additional period of six (6) months from and after the expiration of said first extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this second extended period at the rate of One Hundred Fifty Dollars ($ 150.00) per week.

(c) To extend the term of employment of the artist for an additional period of six (6) months from and after the expiration of said second extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this third extended period at the rate of One Hundred Seventy-five Dollars ($ 175.00) per week.

(d) To extend the term of employment of the artist for an additional period of six (6) months from and after the expiration of said third extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this fourth extended period at the rate of Two Hundred Fifty Dollars ($ 260.00) per week.

(e) To extend the term of employment of the artist for an additional period of six (6) months from and after the expiration of said fourth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this fifth extended period at the rate of Three Hundred Dollars ($ 300.00) per week.

(f) To extend the term of employment of the artist for an additional period of six (6) months from and after the expiration of said fifth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this sixth extended period at the rate of Three Hundred Fifty Dollars ($ 350.00) per week.

(g) To extend the term of employment of the artist for an additional period of six (6) months from and after the expiration of said sixth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this seventh extended period at the rate of Four Hundred Dollars ($ 400.00) per week.

(h) To extend the term of employment of the artist for an additional period of six (6) months from and after the expiration of said seventh extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this eighth extended period at the rate of Six Hundred Dollars ($ 600.00) per week.

(i) To extend the term of employment of the artist for an additional period of one (1) year from and after the expiration of said eighth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this ninth extended period at the rate of Seven Hundred Fifty Dollars ($ 750.00) per week.

~~(j) To extend the term of employment of the artist for an additional period of~~ ( ) from and after the expiration of said ninth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this tenth extended period at the rate of Dollars ($) per week.

(k) To extend the term of employment of the artist for an additional period of ( ) from and after the expiration of said tenth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this eleventh extended period at the rate of Dollars ($) per week.

(l) To extend the term of employment of the artist for an additional period of ( ) from and after the expiration of said eleventh extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this twelfth extended period at the rate of Dollars ($) per week.

(m) To extend the term of employment of the artist for an additional period of ( ) from and after the expiration of said twelfth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this thirteenth extended period at the rate of Dollars ($) per week.

~~Each~~ option hereinbefore referred to may be exercised separately at least fifteen (15) days prior to the expiration of the respective next preceding period of employment, or the producer, at any time, but at least fifteen (15) days prior to the expiration of the term hereof or of any extension thereof, may elect to exercise all or any of the options not already exercised, in which event the term of this agreement shall be extended by the period or periods specified in the option or options so exercised by the producer. The exercise by the producer of any one or more of said options shall not be construed as an election by it not to exercise the remaining options. All notices of the exercise of any option shall be in writing and shall be served upon the artist within the periods above specified.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

REPUBLIC PRODUCTIONS, INC.

By E. H. Goldstein
Secretary-Treasurer.

Leonard Ide
(Artist)

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EXHIBIT B

Republic Productions, Inc.
Republic Studios
4024 Radford Avenue
North Hollywood, California

February 16, 1938.

Mr. Leonard Slye,
c/o Republic Productions, Inc.,
North Hollywood, California.

Dear Mr. Slye:

This will confirm the following agreement between us relating to that certain contract of employment between us, dated October 13, 1937, as amended:

Said contract is hereby amended in the following particulars:

(a) The words and figures "One Hundred Twenty-five Dollars ($125.00)," appearing in Subdivision (a) of Paragraph 23 of said contract, are hereby changed to "One Hundred Dollars ($100.00)."

(b) The words and figures "Two Hundred Fifty Dollars ($250.00)," appearing in Subdivision (d) of Paragraph 23 of said contract, are hereby changed to "Two Hundred Dollars ($200.00)."

(c) The words and figures "Three Hundred Dollars ($300.00)," appearing in Subdivision (e) of Paragraph 23 of said contract are hereby changed to "Two Hundred Fifty Dollars ($250.00)."

(d) The words and figures "Three Hundred Fifty Dollars ($350.00)," appearing in Subdivision (f) of Paragraph 23 of said contract, are hereby changed to "Three Hundred Dollars ($300.00)."

(e) The words and figures "Four Hundred Dollars ($400.00)," appearing in Subdivision (g) of Paragraph 23 of said contract, are hereby changed to "Three Hundred Fifty Dollars ($350.00)." [27]

(f) The words and figures "six (6) months" and "Six Hundred Dollars ($600.00)," appearing in Subdivision (h) of Paragraph 23 of said contract, are hereby changed, respectively, to "one (1) year" and "Four Hundred Dollars ($400.00)."

(g) The words and figures "Seven Hundred Fifty Dollars ($750.00)," appearing in Subdivision (i) of Paragraph 23 of said contract, are hereby changed to "Five Hundred Dollars ($500.00)."

(h) A new Subdivision (j), reading as follows, is hereby added to Paragraph 23 of said contract, immediately following subdivision (i) of said Paragraph 23, and shall be deemed to be made a part of said contract as though therein set forth in full:

"(j) To extend the term of employment of the artist for an additional period of one (1) year from and after the expiration of said ninth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this tenth extended period at the rate of Six Hundred Dollars ($600.00) per week."

[In margin opposite (j)]: Exercised 9/9/43.

Except as herein expressly provided, said con-

tract, as heretofore amended, is not altered, amended or affected in any manner or particular whatsoever.

In consideration of your consent to the foregoing, we hereby exercise the option referred to in Subdivision (a) of Paragraph 23 of said contract, as herein amended. The term of your employment is accordingly extended for an additional period of six (6) months from and after the expiration of the present term thereof, upon the same terms and conditions as are contained in said contract, as amended, except that compensation shall be paid to you during this first extended period at the rate of One Hundred Dollars ($100.00) per week.

If the foregoing is in accordance with your understanding and agreement kindly indicate your approval and acceptance thereof in the space hereinbelow provided. Your signature hereto will also constitute an acknowledgment of due, proper and timely service upon you of the notice of exercise of the aforesaid option.

Very truly yours,
REPUBLIC PRODUCTIONS, INC.,
By /s/ E. H. GOLDSTEIN,
Secretary-Treasurer.

Approved, Accepted and Acknowledged:
/s/ LEONARD SLYE. [28]

EXHIBIT C

North Hollywood, California.

May 9, 1942.

Mr. Leonard Slye,
Professionally known as
Roy Rogers,

c/o Republic Productions, Inc.,
North Hollywood, California.

Dear Mr. Slye:

This will confirm the following agreement between us amending that certain contract of employment between us, dated October 13, 1937, as heretofore amended:

The following provisions are hereby added to Paragraph 23 of said contract, immediately following Subdivision (j) of said Paragraph 23 (said Subdivision (j) having been added to said Paragraph 23 by that certain agreement between us, dated February 16, 1938), and shall be deemed to be a part of said contract as though set forth in full therein:

"(k) To extend the term of employment of the artist for an additional period of one year from and after the expiration of said tenth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this eleventh extended period at the rate of Seven Hundred Dollars ($700.00) per week.

[In margin opposite (k)]: Exercised 8/28/44.

"(l) To extend the term of employment of the artist for an additional period of one year from and after the expiration of said eleventh extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this twelfth extended period at the rate of Eight Hundred Dollars ($800.00) per week.

[In margin opposite (l)]: Exercised 9/18/45.

"(m) To extend the term of employment of the artist for an additional period of one year from and after the [29] expiration of said twelfth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this thirteenth extended period at the rate of Nine Hundred Dollars ($900.00) per week.

[In margin opposite (m)]: Exercised 8/26/46.

"(n) To extend the term of employment of the artist for an additional period of one year from and after the expiration of said thirteenth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this fourteenth extended period at the rate of One Thousand Dollars ($1,000.00) per week.

[In margin opposite (n)]: Exercised 10/15/47.

"(o) To extend the term of employment of the artist for an additional period of one year from and after the expiration of said fourteenth extended period, upon the same terms and conditions as herein contained, except that compensation shall be

paid to the artist for this fifteenth extended period at the rate of One Thousand One Hundred Dollars ($1,100.00) per week."

The foregoing Subdivisions (k) to (o), inclusive, shall be deemed to constitute additional options to us under said Paragraph 23, which additional options are hereby granted by you to us.

In consideration of your consent to the foregoing agreement and of the grant of said additional options to us, we agree that on condition that you fully and completely keep and perform all of your obligations and agreements under said contract of employment, as amended, we will mention your name on the positive prints of, and in all paid advertising and paid publicity issued by us in connection with, each photoplay hereafter released by us in which you appear under said contract of employment, as amended, and complete the portrayal of your role. In all such credit, you shall be given at least featured billing. Nothing contained herein shall be construed to prevent so-called "teaser" and/or special advertising, publicity and/or exploitation relating to the story upon which each respective photoplay is based, any of the members of the cast, the authors, the director or [30] similar matters, without mentioning your name, or to prevent so-called "trailer" or other advertising on the screen without mentioning your name, and no casual or inadvertent failure to comply with the provisions of this paragraph shall constitute a breach of this agreement or of said contract of employment.

Except as herein expressly provided said contract of employment, as heretofore amended, is not hereby changed or amended in any particular.

If the foregoing is in accordance with your understanding and agreement kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Very truly yours,
REPUBLIC PRODUCTIONS, INC.,
By /s/ E. H. GOLDSTEIN,
Secretary-Treasurer.

Approved and Accepted:
/s/ LEONARD SLYE,
/s/ ROY ROGERS. [31]

EXHIBIT D

Agreement

Agreement executed at North Hollywood, California, on February 28, 1948, by and between Republic Productions, Inc., a New York corporation, herein referred to as the "Producer," and Roy Rogers, herein referred to as the "Artist,"

Witnesseth:

1. The Producer hereby employs the Artist to perform services as an actor in not more than nine (9) feature-length western and/or outdoor action photoplays to be designated by the Producer, and

on reasonable notice to perform all reasonably required services incidental thereto, including but not limited to services in connection with making tests, stills, publicity photographs and auditions, wardrobe fittings, publicity interviews, the study of lines and scripts, and participation in conferences and discussions, the making of electrical transcriptions for use in advertising and exploiting said motion pictures, and the making of personal and radio appearances as hereinafter provided. Not more than five (5) of said photoplays shall be produced in either year of the term hereof. Unless at least two (2) of said photoplays are produced during the first year of the original term hereof, the Artist shall have the right to terminate this agreement as of the date of expiration of said first year of said term by serving notice of exercise of such right of termination on the Producer not later than seven (7) days after the expiration of said first year of said term; and similarly unless at least two (2) of said photoplays are produced during the second year of the original term hereof, the Artist shall have the right to terminate this agreement as of the date of expiration of said second year of said term by serving notice of exercise of such right of termination on the Producer not later than seven (7) days after the expiration of said second year of said term; subject, however, to the provisions of Paragraphs 12 and 16 hereof; provided, however, that if the first installment of compensation of [32] the succeeding year shall become due during such

seven (7) day period the Producer may withhold payment thereof until the expiration of such seven (7) day period, and if the Artist serves notice of exercise of such right of termination, such installment shall, of course, not be payable. With respect to personal and radio appearances, it is agreed that the Artist shall not be required to make more than one personal appearance in connection with each photoplay in which he appears hereunder and one radio appearance in connection with each such photoplay, without his consent. The Artist also agrees to make personal appearances during the term hereof at sales conventions of Republic Pictures Corporation or its successors. The Artist hereby accepts this employment and agrees to perform the services above described and to comply fully with all of his duties, obligations and agreements hereunder during the term hereof. The Producer agrees to cooperate with the Artist so as to allow him as much free time for his own purposes as reasonably possible and consistent with the Producer's requirements for his services hereunder. For this purpose, the Producer agrees to advise the Artist of the tentative commencement date of his services in each photoplay hereunder with reasonable promptness after such tentative commencement date has been set by the Producer, and also of all changes made in such tentative commencement date with reasonable promptness after such changes are determined upon, and with respect to the incidental services referred to above, to advise the Artist when

such services will be required as far in advance thereof as reasonably possible. The producer further agrees that it will not require the Artist to report at the Producer's studio or elsewhere at any time when his services are not actually required and if after notifying the Artist to report, the Producer's plans with respect to the Artist's services change, the Producer agrees to notify the Artist of such change of plans as promptly [33] as reasonably possible.

2. The Artist agrees that he will promptly and faithfully comply with all reasonable instructions and requests of the Producer in connection with the performance of his services hereunder, and with all reasonable rules and regulations of the Producer. The Artist further agrees that he will perform his services and comply with all of his agreements hereunder conscientiously and to the full limit of his talents and abilities, at all times (except as hereinafter expressly provided) and wherever required by the Producer and in accordance with the Producer's instructions and directions in all matters arising under this agreement, including those involving artistic taste and judgment. The terms "motion pictures," "photoplays" and their equivalents as used herein include but are not limited to motion picture productions produced, exhibited and/or transmitted by or with sound and voice recording, reproducing and/or transmitting devices, radio devices, television devices and all other devices and improvements, present or future,

which may now or hereafter be used for or in connection with the production, exhibition and/or transmission of any present or future kind of motion picture productions

3. The Artist agrees that he will perform his services in connection with the production of motion pictures solely and exclusively for the Producer during the term hereof, and that he will not at any time during said term, or prior to the commencement thereof, perform services as an actor, writer, director or in any other capacity in or in any way connected with motion pictures or television for himself or for any person or company other than the Producer. The Artist also agrees that he will not advertise, announce or make known, or authorize or permit any person or company, to advertise, announce or make known, directly or [34] indirectly, by any means, that the Artist has contracted to or will perform any such services for anyone other than the Producer or do any other act contrary to the terms of this agreement. The Producer shall have the right to prevent such acts or any of them by appropriate legal procedings, and the Artist hereby authorizes the Producer to initiate and maintain such proceedings in the Artist's name or otherwise.

4. (A) The Artist hereby grants to the Producer the sole and exclusive right to his services for motion picture purposes during the term hereof, and for this purpose the Producer shall have the right to photograph and/or otherwise reproduce

any and all of his acts, poses, plays and appearances of any and all kinds, and to record his voice and all instrumental, musical and other sound effects produced by him, and to reproduce and/or transmit such recordings either separately or in conjunction with such acts, poses, plays and appearances, as the Producer may desire. The Artist also grants to the Producer, solely and exclusively, all rights of every kind and character whatsoever in and to all such photographs, reproductions and recordings and all other results and proceeds of his services hereunder, perpetually, and also the perpetual right to use the Artist's name and pictures or other reproductions of his physical likeness and recordations and reproductions of his voice, in connection with the advertising and exploitation thereof and of the services of the Artist hereunder. The Producer shall have the right to "dub" the voice of the Artist and all instrumental, musical and other sound effects to be produced by him to such extent as the Producer may desire, including the right to "dub" the Artist's voice in English and any other languages desired by the Producer. The Producer shall also have the right to use a "double" for the acts, poses, plays and appearances of the Artist to such extent as may be desired [35] by the Producer.

(B) For the purpose of advertising the photoplays to be produced hereunder, and subject to the reservations set forth in Subparagraph (C) of this Paragraph 4, the Artist also hereby grants to the

Producer the right, during the term hereof, to use and/or authorize the use of his name and/or likeness in so-called "commercial advertising," to wit, advertising relating to products other than motion pictures, subject to the following limitations:

(a) The Producer may not use or authorize the use of the Artist's name or likeness in connection with more than twenty (20) products in either year of the term hereof, nor as the trade name, name or designation of any product, nor in connection with endorsements of any product (but the mere use of the name and/or likeness of the Artist in an advertisement shall not be considered to be an endorsement, for the purposes of this agreement), nor in connection with alcoholic beverages, tobacco, laxatives, deodorants, articles of feminine use, or any other product with which, at the time of such use or authorization, it reasonably might be considered to be detrimental or prejudicial to associate the Artist or inconsistent with or harmful to his position as a motion picture star, particularly with reference to his youthful fan audience.

(b) The Producer may not use or authorize the use of the Artist's name or likeness in connection with any "competing product" (which is defined as any product of the same class or kind as any product manufactured or sold by any person, firm or corporation with whom the Artist may then have or be negotiating for a commercial tie-up or who is the sponsor of any

radio series which the Artist may then have or be negotiating for). The Artist will inform the Producer in writing from time to time during the term hereof of the products in connection with which the Artist may then have or be negotiating for commercial tie-ups and the persons, firms or corporations with whom the Artist may then have or be negotiating for commercial tie-ups. It is agreed, however, that the Artist shall not be estopped by the lists which he gives to the Producer from time to time as aforesaid, and in order to insure compliance with the provisions of the first sentence of this Subdivision (b) the Producer shall advise the Artist in writing of each commercial tie-up for the use of the Artist's name and/or likeness into which it proposes to enter, and if such product is a competing product, the Artist shall so notify the Producer in writing within ten (10) days after the service of the [36] Producer's notice, also stating what the competing product is. If the Artist fails so to notify the Producer, the Producer may then enter into the proposed commercial tie-up. In any event, the Producer shall give due consideration to the wishes and suggestions of the Artist with respect to any such proposed commercial tie-ups.

(c) All commercial advertising authorized by the Producer pursuant to this Subparagraph (B) shall be submitted to the Artist prior to publication or release, and the Producer shall

give due consideration to the wishes and suggestions of the Artist with respect thereto. The Artist will act promptly in making suggestions with respect to all such material.

(d) Any consideration received by the Producer from any such commercial advertising shall promptly be paid over to the Artist.

(C) The Artist reserves to himself the right to enter into any and all commercial tie-ups for products of every kind or character (other than motion pictures) including but not limited to endorsements for commercial purposes, phonograph records, transcriptions (but the Producer shall have the right to make and use the transcriptions provided for in Paragraph 1 hereof for the purposes therein provided), publications (including so-called "comic" books or magazines), guns, shirts, boots, belts, blue jeans, toys, candies and gums, and it is agreed that the Artist may freely exploit and sell such rights to any persons, firms or corporations that the Artist in his sole discretion may determine (except motion picture companies) provided, however, that the Artist agrees:

(a) He shall not use or authorize or willingly permit the use of his name, likeness, or voice in connection with alcoholic beverages, tobacco, laxatives, deodorants, or articles of feminine use, or any other product with which, at the time of such use, authorization or permission, it reasonably might be considered to be detrimental or prejudicial to associate the Artist or inconsistent with or harmful to his

position as a motion picture star, particularly with reference to his youthful fan audience.

(b) In connection with publications (including so-called "comic" magazines), phonograph records, transcriptions and the like, the Artist shall from and after the date of this contract insert or cause to be inserted in all contracts and agreements appertaining thereto, a clause substantially as follows: "The Artist shall not be depicted, described, shown or mentioned, in any form whatsoever, in the character of a villain, thief, or other despicable or derogatory character, or as consuming, dispensing or handling alcoholic beverages, tobacco of any kind or form, laxatives, deodorants, articles of feminine use, [37] or any other product with which it reasonably might be considered to be detrimental or prejudicial to associate the Artist, or as engaging in any mental or physical dissipation, or in any manner which will appeal to the sensual emotions of the reader, but all material shall star the Artist, and depict, describe, show or mention the Artist or any character described by the name of Roy Rogers or Rogers, in a decent and virtuous manner, and as champion of right and the enemy of wrong."

(c) In connection with publications (including so-called "comic" magazines), phonograph records, transcriptions and the like, the Artist agrees that all such [38] material shall be submitted to the Producer prior to publication

or release and the Artist shall give due consideration to the wishes and suggestions of the Producer in connection with the contents and format thereof. The Producer will act promptly in making suggestions with respect to all such material.

(d) All advertising relating to any products in connection with which the Artist enters into commercial tie-ups or agreements (but not including labels, wrappings or containers) shall mention that the Artist is a Republic star, and whenever practical shall also mention the title of a Roy Rogers photoplay then in current release.

(D) The Artist expressly reserves to himself the right to perform in rodeos and to make personal appearances in theaters and other places of entertainment for his own account prior to and during the term hereof, but at such times only as will not in any manner interfere with the Producer's requirements for his services hereunder. Whenever the Artist desires to make a personal appearance or personal appearances in a theater he agrees to consult with the Producer to determine whether one of the motion pictures in which he appears will be exhibited in the city or place in which he desires to make such personal appearance or personal appearances, in a theater or theaters at least equal in standing or character to the theater or theaters in which the Artist proposes to make such personal appearance or personal appearances, and if it is

determined that such will be the case, the Artist agrees to offer his services in the making of personal appearances to the theater or theaters which will be exhibiting such photoplay, in preference to any other theater or theaters in such city or place, provided that the compensation offered to him therefor shall not be less than he could obtain for such services in such other theater or theaters in such city or place.

(E) The Artist expressly reserves to himself the right to make so-called "spot" or "guest" radio appearances (but not including television appearances) for his own account prior to [39] and during the term hereof, but at such times only as will not in any manner interfere with the Producer's requirements for his services hereunder and not for any motion picture company. In the event that the Artist desires to appear on any such radio program at a time when his services are being rendered for the Producer, the Producer agrees to cooperate with the Artist for the purpose of permitting him to make such appearances if reasonably possible to do so. The Artist also reserves the right to appear in one or more series of radio programs, as distinguished from "spot" or "guest" appearances (but not including television appearances and not for any motion picture company), conditioned as hereinafter provided. To the extent that any such series is broadcast during production of a photoplay hereunder, the Producer agrees to release the Artist on the day of the broadcast in time to permit him to rehearse for and make the broadcast, but not

earlier than one o'clock p.m.; provided, however, that if the Artist's circumstances in connection with such broadcast are such as to require his release earlier than one o'clock p.m., the Producer agrees to cooperate with the Artist for the purpose of releasing him earlier than one o'clock p.m., if reasonably possible to do so. In connection with television, the Artist agrees not only not to make any television appearances prior to the expiration of the term hereof, as elsewhere herein provided, but also agrees not to make or willingly permit to be made any film or other device for reproduction by television by anyone other than the Producer at any time prior to the expiration of the term hereof. In connection with his radio appearances, the Artist agrees:

(a) Exclusive of "spot" or "guest" appearances, the Artist shall not make more than one (1) live broadcast during any one (1) calendar week at any time when he is engaged in the production of a photoplay hereunder. [40]

(b) The Artist shall not have the right to render services in any live broadcast at any time when his services hereunder are being rendered on location, unless he makes appropriate arrangements without any cost or expense whatsoever to the Producer to render his services in connection with such broadcast and rehearsals therefor at such time that he is not required to leave such location earlier than one o'clock p.m. of the day of the broadcast and will be able to return to such location in sufficient time to perform his services as

and when instructed on the next day that his services are required by the Producer; provided, however, that if the Artist requires additional time, the Producer agrees to cooperate with the Artist for the purpose of allowing him such additional time to make such broadcasts when on location if reasonably possible to do so.

(c) The sponsorship and material for the broadcast shall not be concerned or connected in any way, directly or indirectly, with alcoholic beverages, tobacco, laxatives, deodorants, articles of feminine use, or any other product with which it is or reasonably might be considered to be detrimental or prejudicial to associate the artist or inconsistent with or harmful to his position as a motion picture star, particularly with reference to his youthful fan audience, nor shall any such broadcast relate, either directly or indirectly, to photoplays or the motion picture industry except with the written consent of the Producer first had and obtained.

(d) The Artist shall not be depicted, described or mentioned in any way in the character of a villain or thief or other despicable or derogatory character or as consuming, dispensing or handling any of the products referred to in subdivision (c) above, or as engaging in any mental or physical dissipation or in any other manner which will appeal to the sensual emotions of the audience, but any

material depicting, describing, showing or mentioning the Artist or any character described by the name of the Artist or which the Artist is to recite or sing on the program, shall refer to the Artist only in a decent and virtuous manner and shall show him to be a champion of right and an enemy of wrong. All agreements which the Artist enters into for the performance of his services on the radio shall include an express obligation on the part of the producer of the radio show to comply with the foregoing provisions. The format and script of all shows in which the Artist is to appear, and (to such extent as may be reasonably possible) all advertising material relating to such shows in which the name or likeness of the Artist is used, shall be submitted to the Producer prior to the broadcast and the Artist shall give due consideration to the wishes and suggestions of the Producer in connection therewith and shall require the producer of the program to do so likewise. The Producer will act promptly in making suggestions with respect to all such material. In this connection, however, the Producer understands that on some occasions scripts of radio shows are revised or rewritten at such a late date as would make it impracticable for the Artist to submit the same to the Producer prior to the broadcast, and in such cases submission shall be excused. All such advertising and publicity material shall mention the fact that the Artist

is a Republic star and shall mention the title of at least one (1) photoplay then in current release in which the Artist appears. Similar courtesy credit shall be accorded in each broadcast itself. The Artist shall cooperate with the Producer in endeavoring to obtain prominent mention of such photoplay or photoplays in such advertising and publicity.

(e) The Artist shall notify the Producer in writing of the day of the week on which he is to perform services on the radio, at least three (3) weeks prior thereto.

(F) Notwithstanding anything to the contrary set forth in subparagraphs (D) and (E) of this paragraph 4, it is hereby expressly agreed that the Artist shall not have the right to render any personal services for himself or for any person, firm or corporation other than the Producer at any time prior to the expiration of the term hereof when the Artist wilfully fails or refuses to perform his services or to comply with his other obligations and agreements hereunder; but this subparagraph (F) shall be subject to the provisions of paragraph 8 hereof relating to the "free periods."

5. The Artist agrees to conduct himself with due regard to public conventions and morals, and further agrees not to do or commit any act or thing that will reasonably tend to degrade him or to bring him into public hatred, contempt, scorn or ridicule, or that will reasonably tend to shock, insult or offend the community or offend public morals or

decency, or to prejudice the Producer or the motion picture industry in general.

6. The Producer shall have the right to lend the services of the Artist to Loew's Incorporated, Twentieth Century-Fox [42] Film Corporation, Paramount Pictures, Inc., Warner Brothers Pictures, Inc., RKO Radio Pictures, Inc., Universal Pictures Company, Inc., Columbia Pictures Corporation, and Walt Disney Productions, or to any one or more of said companies (but not to any other person, firm or corporation) for any one or more of the photoplays provided for in this agreement, subject, however, to the following conditions and limitations:

(a) The Producer shall not have the right to lend the Artist for more than one (1) photoplay in any one (1) year of the term.

(b) The Artist shall not be required to render services in connection with any particular loan-out for more than eight (8) weeks.

(c) Any photoplay for which the Artist is loaned shall be at least comparable in quality and cost to the photoplays in which the Artist has theretofore appeared hereunder.

(d) In the event that any particular loan-out of the Artist in connection with any photoplay shall continue for any period in excess of five (5) weeks the Artist shall be entitled to receive, and the Producer agrees to pay to the Artist (in addition to all other compensation payable to the Artist hereunder), an amount

equal to one-half (½) of the profits, if any, made by the Producer from such loan-out. For the purposes of this subdivision (d), the "profits" made by the Producer from a loan-out shall be deemed to be the total of the sums paid by the borrower to and actually received by the Producer as consideration for the loan-out, less (1) the sum of Twenty-two Thousand Two Hundred Twenty-two Dollars and Twenty-two Cents ($22,222.22), (2) any additional compensation payable to the Artist with respect to the particular photoplay pursuant to paragraph 12 hereof, (3) the sum of Five Hundred Dollars ($500.00) and (4) costs of collection, if any. It is understood and agreed that if the Producer desires to lend the services of the Artist, it shall not be obligated to lend such services at a profit, as defined in this subdivision (d). It is further agreed that if the term of the loan does not exceed five (5) weeks, the Artist shall not be entitled to any additional compensation with respect to such loan pursuant to the provisions of this subdivision (d), whether or not the Producer makes a profit from such loan; and in this connection, if the term of the loan is a period of five (5) weeks or less, and in addition the Producer makes the Artist's services available to the borrower after the expiration of the term of the loan for retakes, added scenes, sound track or changes, for an aggregate of

not to exceed five (5) days, such loan shall, for the purposes of this subdivision (d), be considered to be a loan for a period of five (5) weeks or less (even though the aggregate time actually exceeds five (5) weeks), and the [43] Artist shall not be entitled to any additional compensation for such loan. Any additional compensation which may accrue to the Artist pursuant to the provisions of this subdivision (d) shall become due and payable within two (2) weeks following the expiration of the loan in question, and if additional payments are received by the Producer from the borrower after such two (2) weeks period, then within two (2) weeks after each respective payment is received.

In the event that the services of the Artist are loaned pursuant to this Paragraph 6, the services which may be performed by or required of the Artist pursuant to such loan shall be deemed to be performed or required under this agreement in all respects and the Artist shall not be required to do any act or perform any services under any such loan contrary to the provisions of this agreement. The obligations of the borrower shall be subject to the provisions of this agreement in all respects, but no act or omission of any such company shall constitute a breach of this agreement by the Producer, nor shall the Artist have the right to terminate this agreement, or have any other right or remedy against the Producer, by reason of any such act or omission of any such company. In the event, however, of any act or omission of any such com-

pany which, if it were the act or omission of the Producer, would constitute a breach of this agreement by the Producer, the Artist shall be released from the obligation to perform further services for such company in connection with the particular photoplay for which the Artist's services were loaned to such company, but such right of release shall be in addition, and without prejudice, to the Artist's other rights and remedies at law or in equity against the borrower. The Artist shall perform services for such company (provided that the conditions prescribed in this Paragraph 6 are complied with) conscientiously and to the full limit of his talents and abilities, and such company, at the option of the Producer, shall be [44] entitled to the same rights in and to the results and proceeds of the Artist's services for such company, and to the advertising and other rights in connection with the particular photoplay, as the Producer would have had hereunder had such services been performed for the Producer.

7. The Artist agrees that the Producer may at any time or times, in its own or in the Artist's name, but at its own expense, apply for life, health, accident, or other insurance covering the Artist, in any amount which the Producer may deem necessary [45] to protect its interests hereunder, provided, however, that the Artist does not represent that such insurance is obtainable. The Producer may be the beneficiary of and shall own all rights in such policies and the cash values and proceeds

thereof, and the Artist shall have no rights, title or interest therein or with respect thereto. The Artist agrees to assist in procuring such insurance by submitting to the customary medical examinations and by correctly preparing, signing and delivering such applications and other documents as may reasonably be required.

8. (A) The term of this agreement shall begin on March 1, 1948, and shall continue for a period of two (2) years from and after said date.

(B) However, it is expressly agreed by the Producer that the Artist shall not be required to perform services hereunder during the months of September and October (herein referred to as the "free period") of each year of the term hereof; provided, however, that if the Producer has commenced production of a photoplay hereunder at least as long prior to the commencement of the next free period as the production schedule of such photoplay, and is unable to complete the photographing and recording of the Artist's role in such photoplay prior to the commencement of such free period solely because of a wilful refusal of the Artist, without justification, to perform his services for the Producer in connection with such photoplay as required by this agreement, the Producer shall be entitled to the Artist's services, and the Artist agrees to render his services for the Producer, during such free period for a period equal to the delay caused by such wilful refusal of the Artist, but not beyond the completion of the photographing and

recording of such role. The Artist shall have the right to make rodeo tours and to perform any other kind of work (except in connection with motion pictures and television) for his own account during said free [46] periods, subject to the completion of his services for the Producer in a photoplay under the conditions specified in the proviso of the preceding sentence. The Producer shall not have the right to extend this agreement because of said free periods and the Artist shall be paid his regular installments of compensation which become due during said free periods. In the event that the Artist desires to take his free period in any particular year at any time other than as specified above, he shall have the right to designate two (2) other consecutive months during such year for such free period, provided that he notifies the Producer in writing of such other two (2) months period at least five (5) months prior to September 1st and also at least five (5) months prior to the date of commencement of the two (2) consecutive months designated by the Artist as his free period; and provided further that at least five (5) months shall intervene between each free period. The Artist shall not have the right to change the free period of any particular year more than once.

(C) The Producer agrees to endeavor to arrange its production schedule in such manner that the Artist shall have at least two (2) weeks of free time between each of the photoplays in which he is to appear hereunder and immediately following each free period. The Artist understands, how-

ever, that due to the exigencies of production, it may not always be possible for the Producer to arrange for such periods of free time between pictures or after a free period.

9. In the event of any extension of the first year of the original term of this agreement, the date of commencement of the second year of said term shall be postponed accordingly; and in the event of any extension of the second year of said term, the date of commencement of the optional term of this agreement [47] (if the option therefor is exercised) shall be postponed accordingly, it being understood that an extension of either year of said original term shall have the effect of extending said original term for an equivalent period. The phrases "the term hereof," "the term of this agreement" or other phrases of like tenor, as used in this agreement, shall mean (unless a different meaning clearly appears from the context) the term provided for in Subparagraph (A) of Paragraph 8 hereof or the optional term provided for in Paragraph 27 hereof, whichever may be current at the time referred to, including all extensions of the respective term, if any. Wherever reference is made in this agreement to a "year of the term," such reference, insofar as the optional term provided for in Paragraph 27 hereof is concerned, shall be deemed to be a reference to said optional term, and a "year of the term," as said phrase is used in this agreement, includes all extensions of the respective year of the term, if any.

10. For a good and valuable consideration, receipt of which is hereby acknowledged by the Producer, the Producer hereby agrees to pay the Artist the sum of Ten Thousand Dollars ($10,000.00) concurrently with the execution of this agreement. Receipt of said payment is hereby acknowledged by the Artist.

11. As full compensation for the services of the Artist to be rendered or tendered pursuant hereto during the original term hereof, and for all rights herein granted or agreed to be granted by the Artist to the Producer, the Producer agrees to pay the Artist the sum of Two Hundred Thousand Dollars ($200,000.00). Said compensation shall become due and payable in weekly installments as follows:

One Hundred Three (103) installments of One Thousand Nine Hundred Twenty-Three Dollars and Eight Cents ($1,923.08); and

One (1) installment of One Thousand Nine Hundred Twenty-Two Dollars and Seventy-Six Cents ($1,922.76). [48]

The first installment shall become due and payable on the first Thursday following the expiration of the first week of the term hereof and the remaining installments shall become due and payable weekly thereafter, subject to the provisions of this agreement with respect to withholding payment of installments of said compensation. In connection with any such withholding for or with respect to any period of less than a week, the weekly installments may be prorated, and for this purpose the rate per

day shall be one-sixth (1/6) of the respective weekly rate.

12. If at the expiration of this agreement (to wit, at the expiration of the original term or, if the option provided for in paragraph 27 hereof is exercised, at the expiration of said optional term, or if the Artist exercises the right of termination granted to him in paragraph 1 hereof, then at the expiration of the respective year of the original term, or if the Artist exercises the right of cancellation granted to him in paragraph 27 hereof, then at the expiration of the original term hereof) the Artist is engaged in a photoplay being produced hereunder, the Artist agrees to continue to render services hereunder until the completion of such of his services as the Producer may require in connection with such photoplay, not exceeding eight (8) weeks, and additional compensation shall be payable to the Artist for said additional period at the weekly rate of One Thousand Nine Hundred Twenty-Three Dollars and Eight Cents ($1,923.08). If after the expiration of this agreement the Producer should desire the services of the Artist in making retakes, added scenes, sound track or changes in any photoplay or photoplays in which the Artist has appeared during his employment hereunder, and if all such retakes, added scenes, sound track and changes can be completed in an aggregate of not to exceed ten (10) days, the Artist agrees to render his services [49] in connection therewith as and when the Producer may request, unless the Artist is

otherwise employed, but if otherwise employed the Artist agrees to cooperate to the fullest extent in the making of such retakes, added scenes, sound track and/or changes, and no compensation shall be payable to the Artist for such additional services for said additional ten (10) days.

13. In the event that by reason of any mental or physical or other disability the Artist shall be incapacitated from fully performing the terms hereof or complying with each and all of his obligations hereunder, or in the event that he suffer any facial or physical disfigurement materially detracting from his appearance on the screen or interfering with his ability to perform properly his required services hereunder, or in the event that his present facial or physical appearance be materially altered or changed, or in the event that he suffer any impairment of his voice, or in the event that he become unable to perform his services hereunder or to comply with any of his other agreements hereunder to the fullest extent for any other cause which renders such inability excusable at law (each and all of said conditions being herein referred to for convenience as "disability," it being understood, however, that the existence of any of the foregoing conditions for not to exceed two (2) consecutive weeks or four (4) aggregate weeks during either year of the term hereof at a time or times when the Artist's services are not actually required hereunder shall not be deemed a "disability" or a part of any period of "disability" within the meaning

of this paragraph 13), the Producer shall have the right to withhold payment of all or any of the installments of the Artist's compensation which would otherwise become payable during the period or periods of such disability, and shall also have the right to extend the year of the term in which such disability occurs for a period equivalent to all or any part of such period [50] or periods. If any suspension of payments pursuant to this paragraph should continue for a period or aggregate of periods in excess of eight (8) weeks during either year of the term hereof, the Producer may elect to terminate this agreement. The foregoing provisions for withholding payment of installments of the Artist's compensation, for extensions, and for termination are subject to the provisions of paragraph 16 hereof. In connection with any such disability, the Producer shall have the right to have the Artist examined at any reasonable time or times by any physician or physicians the Producer may designate, whether prior to or during the term hereof, and the Artist agrees to be available for and to submit to such examinations and to such tests as may be desired whenever reasonably so required.

14. In the event that at any time during the term hereof the Producer should be materially hampered, interrupted or interfered with in the preparation, production or completion of any photoplay in which the Artist is rendering or is to render services hereunder, by reason of any fire, casualty, lockout, strike, labor conditions, unavoidable acci-

dent, riot, war, act of God, the enactment, issuance or operation of any municipal, county, state or federal law, ordinance or executive, administrative or judicial regulation, order or decree, or any local or national emergency or unusual condition, or any other cause of the same or any similar kind or character, or if by reason of the illness or incapacity of any principal member of the cast (other than the Artist) of any photoplay in which the Artist is rendering or is scheduled to render services the production of such photoplay is necessarily suspended, interrupted or postponed, or if for any reason whatsoever the majority of the motion picture theaters in the United States shall be closed for a week [51] or any period in excess of a week (each and all of said events being herein referred to for convenience as "force majeure"), then and in any of said events this agreement, at the option of the Producer, may be suspended during the continuance of such event or events, and the Producer shall have the right to withhold payment of all or any of the installments of the Artist's compensation which would otherwise become payable during the period or periods of such suspension and shall also have the right to extend the year of the term in which the force majeure occurs for a period equivalent to all or any part of any period or periods during which any such event or events shall continue. In the event that the services of the Artist are loaned to any company pursuant to the provisions of Paragraph 6 and the preparation, production or completion of photoplay for which the

services of the Artist are loaned is materially hampered, interrupted or interfered with by any "force majeure," the Producer shall have the same rights and remedies prescribed in this Paragraph 14 as though the respective photoplay were one of the Producer's own photoplays. If any suspension or suspensions referred to in this paragraph should continue for a period or aggregate of periods in excess of twelve (12) weeks during either year of the term hereof, either the Artist or the Producer may elect to terminate this agreement; provided, however, that no suspension or suspensions by reason of illness or incapacity of any principal member of the cast (other than the Artist) shall authorize the Producer to exercise said right of termination; provided further that should the Artist desire to elect to terminate this agreement pursuant to this paragraph, he shall give written notice of such desire to the Producer, and if the Producer should not cancel such suspension and resume and thereafter continue the payment of the weekly installments of [52] compensation hereinabove specified, commencing as of not later than one (1) week after the receipt of such notice from the Artist (subject, however, to suspension of the payment of installments of compensation for other proper cause), this agreement shall thereupon terminate. If the Producer should resume the payment of said installments of compensation, however, commencing as of not later than one (1) week after the receipt of such notice, and thereafter continue payments as aforesaid, this agreement shall continue in full

force and effect, but the Producer shall have no further [53] right to withhold payment of installments of compensation during such year of the term pursuant to this paragraph, or to extend such year of the term pursuant to this paragraph with respect to any period or periods during such year of the term during which any force majeure occurs after the resumption of the payment of installments of compensation. The foregoing provisions for withholding payment of installments of the Artist's compensation, for extensions, and for termination are subject to the provisions of paragraph 16 hereof.

15. (A) It is understood and agreed by and between the parties hereto that the services to be rendered by the Artist under the terms hereof, and the rights and privileges granted to the Producer by the Artist under the terms hereof, are of a special, unique, unusual, extraordinary and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and that a breach by the Artist of any of the provisions contained in this agreement will cause the Producer irreparable injury and damage. The Artist hereby expressly agrees that the Producer shall be entitled to injunctive and other equitable relief to prevent a breach of this agreement by the Artist. Resort to injunctive and other equitable relief, however, shall not be construed as a waiver of any other rights or remedies which the Producer may have in the premises, for damages or otherwise, nor shall the prosecution of an action at law for

damages or other legal relief be construed to be a waiver of any other rights or remedies which the Producer may have in equity or otherwise. Without waiving any such other rights or remedies, the Producer may maintain an action for damages for breach of this agreement, and may also maintain subsequent actions for damages for other breaches of this agreement, and the institution or maintenance of any such action or actions shall not constitute or result in a termination of this agreement by the Producer (but shall be without prejudice to any right of the Producer to terminate this agreement, whether pursuant to any provision of this agreement or [54] any right at law). In the event of the refusal, wilful failure or knowing neglect of the Artist to perform his services as provided in this agreement or to observe any of his other obligations hereunder, or in the event that the Artist advises or otherwise indicates to the Producer (directly or through his agent or attorney) that he does not intend to perform his services as provided in this agreement or to observe any of his other obligations hereunder, the Producer shall have the right to terminate this agreement at any time while such refusal, wilful failure or knowing neglect continues or within fifteen (15) days after the cessation thereof, or at any time after the Artist advises or otherwise indicates to the Producer that he does not intend to perform (or within fifteen (15) days after he advises the Producer in writing that he is ready, able and willing to per-

form). The provisions of the preceding sentence shall not be construed to limit or exclude any other rights at law which the Producer may have, whether of termination or otherwise, in the event of a breach of this agreement by the Artist, all such legal rights being hereby expressly reserved by the Producer. In the event of the refusal, failure or neglect of the Artist to perform his services as provided in this agreement or to observe any of his other obligations hereunder, or in the event that the Artist advises or otherwise indicates to the Producer (directly or through his agent or attorney) that he does not intend to perform his services as provided in this agreement or to observe any of his other obligations hereunder (such failure, refusal or neglect, whether actual or anticipatory, as aforesaid, being herein referred to for convenience as "default") the Producer shall have the right to withhold payment of all or any of the installments of the Artist's compensation which would otherwise become payable during the period of such default on the part of the Artist, and shall likewise have the right to extend the year of the term in which such default occurs for a period [55] equivalent to all or any part of the period during which such default continues. Any such default of the Artist shall be deemed to continue until the Artist shall, in writing, notify the Producer of the Artist's willingness to render services hereunder and to comply with his other obligations and agreements; provided, however, that if at the time such

default commences, the Artist shall have been cast to portray a role in a photoplay or shall have been directed to render any other of his required services hereunder, and such default is of such character and duration that the Producer cannot, in its judgment (exercised reasonably and in good faith) utilize the Artist's services as planned, upon his notifying the Producer of his willingness to render services hereunder and to comply with his other obligations and agreements, the Producer shall have the right to withhold payment of all or any of the installments of the Artist's compensation which would otherwise become payable (a) during the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (b) should another person have been engaged to portray such role or to render such other services, until the completion of such role or such other services by such other person (unless such other person does not for any reason complete such role or other services, in which event subdivision (a) just above shall govern), and in any or either of such events the Producer shall also have the right to extend the respective year of the term for a like period of time or for any portion thereof. Notwithstanding anything to the contrary above set forth in this paragraph, however, it is agreed that any period during which the Producer is entitled to withhold payment of installments of the Artist's compensation and with respect to which the Producer is entitled to extend the year of the term, [56] pur-

suant to any of the provisions of this paragraph, shall end if and when the Artist shall be requested by the Producer to and shall render other services hereunder. In the event that the Artist was cast to portray a role in a photoplay at the time of commencement of any default of the Artist hereunder, and production of such photoplay is abandoned or the Artist is taken out of the photoplay because of such default, then in addition to any other right of extension provided for in this paragraph the Producer shall also have the right to extend the then current year of the term for an additional period not to exceed four (4) weeks if necessary in order to select and prepare a substitute photoplay for the Artist. The foregoing provisions for withholding payment of the Artist's compensation, for extentions, and for termination are subject to the provisions of paragraph 16 hereof. Each and all of the several rights, remedies and options of the Producer contained in this agreement shall be construed as cumulative and no one of them as exclusive of the others or of any right or remedy allowed by law. All options granted to the Producer herein for extending a year of the term, as well as the option to cancel a photoplay pursuant to subparagraph (B) of paragraph 16, shall be exercised by the Producer by notice in writing to be served upon the Artist at any time prior to the expiration of the respective year of the term in which such option accrued; provided, however, that if the option to cancel a photoplay pursuant to subparagraph (B) of paragraph 16 shall accrue

with respect to the fifth photoplay of the first year of the original term, the Producer may (provided it did not exercise its right to extend by virtue of the particular default involved, prior to the expiration of the first year of the term) exercise said option to cancel a photoplay at any time prior to the expiration of the original term. [57]

(B) In the event of the refusal, wilful failure, or knowing neglect of the Producer to observe any of its obligations hereunder, or in the event that the Producer advises or otherwise indicates to the Artist that it does not intend to observe any of its obligations hereunder, the Artist shall have the right to terminate this agreement at any time while such refusal, wilful failure, or knowing neglect continues, or within fifteen (15) days after the cessation thereof, or at any time after the Producer advises or otherwise indicates to the Artist that it does not intend to perform its obligations, or within fifteen (15) days after it advises the Artist in writing that it is ready, able and willing to perform. The provisions of the preceding sentence shall not be construed to limit or exclude any other rights at law which the Artist may have, whether of termination or otherwise, in the event of a breach of this agreement by the Producer, all such legal rights being hereby expressly reserved by the Artist. Resort to injunctive and other equitable relief shall not be construed as a waiver of any other rights or remedies which the Artist may have [58] in the premises, for damages or otherwise, nor shall the prosecution of an action at

law for damages or other legal relief be construed to be a waiver of any other rights or remedies which the Artist may have in equity or otherwise. Without waiving any such other rights or remedies, the Artist may maintain an action for damages for breach of this agreement, and may also maintain subsequent actions for damages for other breaches of this agreement, and the institution or maintenance of any such action or actions shall not constitute or result in a termination of this agreement by the Artist (but shall be without prejudice to any right of the Artist to terminate this agreement, whether pursuant to any provision of this agreement or any right at law). Each and all of the several rights, remedies and options of the Artist contained in this agreement shall be construed as cumulative and no one of them as exclusive of the others or of any right or remedy allowed by law.

16. (A) It is recognized that this agreement grants the Producer certain rights of extension, but it is hereby declared to be the intent of the parties that no year of the term hereof shall be extended except to the extent that it may be necessary to do so in order to enable the Producer to complete the production of the full quota of photoplays in which it is entitled to the services of the Artist hereunder, during such year of the term. The term "full quota of photoplays" as used in this Paragraph 16 means five (5) photoplays, if the Producer is entitled to produce five (5) photoplays hereunder during the then current year of

the term and elects to do so during said year, or four (4) photoplays if the producer is entitled to produce only four (4) photoplays hereunder during such year of the term or is entitled to produce five (5) but elects to produce only four (4); and said term likewise means [59] four (4) photoplays during the optional term if the option therefor is exercised. The Artist acknowledges, however, that the manner of scheduling the production of said photoplays and the effect of the occurrence of the various contingencies with respect to which the Producer has the right of extension upon the scheduling of production of said photoplays, is a matter of business judgment and that the decision of whether and to what extent to exercise said rights of extension shall be solely within the control of the Producer. The Producer agrees to exercise its judgment in this respect reasonably and in good faith so that no year of the term shall be extended beyond the time reasonably necessary for the Producer's requirements. In this connction it is further agreed that if production of the full quota of photoplays of any year of the term is completed during such year of the term, exclusive of any extensions, the Producer shall not exercise any right of extension which may have accrued unless failure to extend such year of the term would prejudice the Producer's schedule for the production of the full quota of photoplays of the next year of the term, if any, in which event the Producer shall exercise its right of extension only to the extent necessary so as not to prejudice its schedule for such next year of the term. Moreover if production of the full quota of photoplays

of any year of the term is completed during such year of the term as extended, but prior to the expiration of the full permissible extended period, any additional extension of such year of the term shall be cancelled and any additional right of extension of such year of the term shall not be exercised, unless such cancellation or failure to exercise such further right of extension would prejudice the Producer's schedule for the production of the full quota of photoplays of the next year of the term, if any, in which event the cancellation shall be effected or the additional right of extension shall be exercised only to the extent necessary so as not to prejudice the Producer's schedule for such next year of the term. [60]

(B) The Artist's "full compensation" for the purpose of this paragraph 16 shall be deemed to be the sum of Two Hundred Thousand Dollars ($200,000.00) for the original term and the sum of One Hundred Thousand Dollars ($100,000.00) for the optional term; provided, however, that in the event that the Artist refuses to perform his services in the production of any photoplay as required by this agreement, and solely as a result of such refusal such photoplay is abandoned or the Artist is taken out of such photoplay, the Producer may, in lieu of extending the respective year of the term because of such refusal, cancel the photoplay with respect to which the Artist has refused to render services, and upon such cancellation the Artist's full compensation shall thereupon be deemed to be reduced by the sum of Twenty-two Thousand Two

Hundred Twenty-two Dollars and Twenty-two Cents ($22,222.22) and the maximum number of photoplays to which the Producer is entitled hereunder shall be reduced by one photoplay; but said full compensation shall not in any event be reduced to an amount less than the Artist's earned compensation. The "earned compensation" of the Artist at any particular time, for the purposes of this paragraph 16 shall be the product of Twenty-two Thousand Two Hundred Twenty-two Dollars and Twenty-two Cents ($22,222.22) times the number of photoplays in which the Artist has theretofore completed his role during the then current year of the term, or, insofar as subparagraph (D) hereof is concerned, to the date of termination or death. In the event that the right to withhold payment of installments of the Artist's compensation accrues pursuant to paragraphs 13 or 14, or pursuant to paragraph 15 (other than by virtue of such a default by the Artist as would authorize a termination of this agreement by the Producer), at a time when the Artist has not yet received his earned compensation to that time, the Producer shall continue to pay said installments of compensation during the period of disability, force majeure or such default (notwithstanding the provisions of said paragraphs 13, 14 and 15 with respect to withholding payment of said installments) [61] until the Artist has received his earned compensation to that time, and at that point the Producer may then exercise its right to withhold payment of installments of the Artist's compensation during any

further period of disability, force majeure or such default. Payment of installments of the Artist's compensation during periods of disability, force majeure or such default pursuant to the provisions of this subparagraph (B) shall be without prejudice to the Producer's right to extend the respective year of the term for all or any part of the full period of disability, force majeure or such default as provided in paragraphs 13, 14 and 15; and if the amount of compensation which the Artist is entitled to receive for the respective year of the term, as provided in subparagraph (C) of this paragraph 16, is paid prior to the expiration of such year of the term, as extended, no additional weekly installments of compensation shall be payable to the Artist for the period or periods of extension (if any) of such year of the term which follow the date of payment of the last installment of the Artist's said compensation for such year of the term.

(C) Notwithstanding the exercise by the Producer during any year of the term of the right to withhold payment of any installments of the Artist's compensation, the Artist shall be entitled (subject to the provisions of subparagraph (D) of this paragraph 16) to receive for such year of the term the sum of One Hundred Thousand Dollars ($100,000.00) (less Twenty-two Thousand Two Hundred Twenty-two Dollars and Twenty-two Cents ($22,222.22) for any photoplay which is cancelled by the Producer pursuant to the provisions of subparagraph (B) of this paragraph 16),

regardless of the number of photoplays in which the Artist performs services hereunder during such year of the term, and any unpaid balance of such compensation for such year of the term [62] plus any additional amounts required to be paid by virtue of paragraphs 6, 12, 16(E), 18 and 25 hereof shall be due and payable to the Artist within one (1) week after the expiration of such year of the term, or if any of said additional amounts have not yet accrued, then (as to such amounts) when they accrue.

(D) In the event that this agreement is terminated pursuant to any of the provisions of Paragraphs 13, 14 or 15 hereof, or in the event of the death of the Artist prior to the date which would otherwise be the date of expiration of the term, the Producer shall be obligated to pay (a) any and all installments of the Artist's compensation which have theretofore become due but have not been paid, and (b) any and all additional amounts required to be paid by virtue of Paragraphs 6, 12, 16(E), 18 and 25; and in the further event that as of the date of termination or death the earned compensation of the Artist (as defined in Subparagraph (B) of this Paragraph 16) exceeds the aggregate of the installments of compensation theretofore actually received by the Artist plus the arrearages referred to in clause (a) just above, if any, to be paid as aforesaid, the Producer shall also pay the Artist the amount of such excess. All payments required to be made pursuant to this Subparagraph (D) shall, if theretofore accrued, be made to the Artist

within one (1) week following the date of termination or (in case of the death of the Artist) shall be made to the Artist's estate within one (1) week following receipt by the Producer of notice of appointment of the Artist's executor or of the administrator of his estate, and if not theretofore accrued, shall be made when they become due.

(E) (a) If the Artist commences the performance of his services in a photoplay hereunder and the production of such photoplay is abandoned by the Producer for any cause or the Artist is taken out of the photoplay by the Producer for any cause before the Artist has substantially completed the portrayal of his role therein, such photoplay in either such event being hereinafter in this [63] Subparagraph (E) designated as an "incomplete photoplay," such photoplay shall not be counted as one of the full quota of photoplays hereunder.

(b) If, in addition to such incomplete photoplay or photoplays, the Artist completes or substantially completes the portrayal of his role in the full quota of photoplays for the year of the term in which such incomplete photoplay or photoplays were produced, he shall be entitled to additional compensation for any such incomplete photoplay or photoplays. Such additional compensation shall be computed at the rate of One Thousand Nine Hundred Twenty-Three Dollars and Eight Cents ($1,923.08) per week and shall be payable for [64] the period that the Artist rendered services in connection with such incomplete photoplay, less any portion of said period during which the Artist's

services could not be utilized by virtue of force majeure or the Artist's disability or the Artist's default. Any such additional compensation shall be due and payable within one (1) week following the expiration of the year of the term in which such incomplete photoplay was produced.

(c) In any event, if any incomplete photoplay or any part thereof is thereafter released and the Artist appears therein in any scene or scenes whatsoever the Artist shall thereupon forthwith be entitled to all of the benefits of Paragraph 26 hereof in connection with such incomplete photoplay or part thereof and shall likewise (unless the abandonment or removal of the Artist was caused solely by a refusal of the Artist to perform his services in the production of such photoplay as required by this agreement) forthwith be paid an additional sum which shall be the same percentage (but not to exceed 100 per cent) of Twenty-Two Thousand Two Hundred Twenty-Two Dollars and Twenty-Two Cents ($22,222.22) as the number of days on which the Artist rendered services in connection with such incomplete photoplay is of the total number of days which the production schedule called for the Artist to render actual services, less, however, any additional compensation which had theretofore been paid to Artist in connection with such incomplete photoplay pursuant to Subdivision (b) of this Subparagraph (E).

(F) The making of any payment or payments by the Producer to the Artist pursuant to any pro-

vision of this agreement shall be without prejudice to the rights of the Producer for equitable relief or at law, for damages or otherwise, by virtue of any default hereunder by the Artist which may have occurred prior to the making of such payment or payments; and similarly the acceptance by the Artist of any payment or payments made by the Producer to the Artist [65] pursuant to any provision of this agreement shall be without prejudice to the rights of the Artist for equitable relief or at law, for damages or otherwise, by virtue of any default hereunder by the Producer which may have occurred prior to the receipt of such payment or payments.

(G) In the event of the termination of this agreement pursuant to the exercise by either party of any right of termination, all further rights of the Producer to the services of the Artist hereunder shall terminate (except as provided in Paragraph 12 hereof), including all further rights of the Producer to the services of the Artist pursuant to Paragraph 27 hereof, but all rights herein granted to the Producer in and to the results and proceeds of the services of the Artist and the right to use the name, voice and likeness of the Artist for advertising and publicity purposes in connection with his motion pictures, shall remain vested in the Producer notwithstanding any such termination, and the Producer agrees to continue to comply with the provisions of Paragraph 26 hereof.

17. All "character" or "period" wearing apparel (except "western" wearing apparel) necessary for the portrayal of any role hereunder by the Artist shall be furnished by the Producer. All other wardrobe and wearing apparel necessary for the performance of the Artist's services hereunder shall be furnished by the Artist. Any costumes, apparel or other articles furnished or paid for by the Producer pursuant to this Agreement or otherwise shall be deemed to be furnished to the Artist solely for the Artist's use hereunder and shall be returned promptly to the Producer.

18. The services of the Artist hereunder are to be rendered at such place or places within the United States as may from time to time be designated by the Producer. When the Artist is required to render his services at any place beyond twenty-five (25) miles from Producer's North Hollywood studios, the Producer agrees to furnish [66] first-class meals and transportation for the Artist during and on account of the rendition of such services and where, in the judgment of the Producer, it is necessary for the Artist to remain at such place overnight, the Producer agrees to furnish first-class lodging for the Artist. Likewise the Producer shall at its own expense transport to any such place the Artist's horse, "Trigger," (it being understood that the Artist may use one or more of several "Triggers") and special equipment furnished by the Artist in connection with any photoplay produced hereunder, but the Artist shall permit the Producer

to use his horse truck for the purpose of transporting "Trigger," as provided in Paragraph 25 hereof.

19. Nothing in this agreement shall be construed so as to require the commission of any act contrary to law, and whenever there is any conflict between any provision of this agreement and any material present or future law, ordinance or administrative, executive or judicial regulation, order or decree, or amendment thereof, contrary to which the parties have no legal right to contract, the latter shall prevail, but in such event the affected provision or provisions of this agreement shall be modified only to the extent necessary to bring them within the legal requirements and only during the time such conflict exists.

20. The Artist warrants that he is now a member in good standing of Screen Actors Guild, Inc., and agrees that during [67] the entire term of this agreement during such period or periods as it may be lawful for the Producer to require the Artist so to do, the Artist will remain or become and remain a member in good standing of the properly designated labor organization or organizations (as defined and determined under the applicable law) representing persons performing services of the type and character that are required to be performed by the Artist hereunder.

21. The Producer may transfer or assign this agreement to any company which owns or controls

a majority of its stock or to any company with which it may be merged or consolidated or which may acquire all or substantially all of its stock and/or property or to any other corporate successor of the Producer, and this agreement shall inure to the benefit of and be binding upon the Producer and such successors or assigns. If this agreement is assigned, in accordance with the foregoing provisions, all references herein to the Producer shall likewise be deemed to be references to the assignee.

22. The Artist hereby authorizes the Producer to deduct from each installment of compensation to the Artist hereunder an amount equal to one-half of one per cent (½%) of the gross amount thereof and to pay the amount so deducted to the Motion Picture Relief Fund of America, Inc. The Producer shall also have the right, as the Artist's employer, to deduct and withhold from the Artist's compensation the amounts required to be deducted and withheld by the Producer as the Artist's employer by any present or future law, ordinance or administrative, executive or judicial regulation, order or decree, or amendment thereof, requiring the withholding or deduction of compensation.

23. No waiver by the Producer or the Artist of any breach of any covenant or provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision.

24. All notices which the Producer is required or may [68] desire to serve upon the Artist under

or in connection with this agreement may be served by addressing them to the Artist in care of Mr. W. Arthur Rush, Suite 116 NBC-Radio City, Sunset and Vine, Hollywood 28, California, or at such other address as the Artist may hereafter designate to the Producer from time to time in writing, and by depositing them so addressed, registered and postage prepaid, in the United States mail in Los Angeles or North Hollywood, California, or by sending them so addressed by telegraph or cable. The deposit of any notice in the United States mail in Los Angeles or North Hollywood, California, registered and postage prepaid, addressed as aforesaid, or the delivery of any notice to the telegraph or cable office in Los Angeles or North Hollywood, California, addressed as aforesaid and prepaid, shall constitute service of such notice on the Artist, and the time of receipt of such notice by the Post Office as indicated on the registry receipt or the time of delivery of such notice to the telegraph or cable office as indicated by the telegraph or cable company on the copy of the telegram or cable, shall be the time of service of such notice. All notices which the Artist is required or may desire to serve upon the Producer under or in connection with this agreement may be served by addressing them to the Producer at 4024 Radford Avenue, North Hollywood, California, or at such other address as the Producer may hereafter designate to the Artist from time to time in writing, and by depositing them so addressed, registered and postage prepaid, in the United States mail in Los Angeles, Hollywood or

Beverly Hills, California, or by sending them so addressed by telegraph or cable. The deposit of any notice in the United States mail in Los Angeles, Hollywood or Beverly Hills, California, registered and postage prepaid, addressed as aforesaid, or the delivery of any notice to the telegraph or cable office in Los Angeles, Hollywood or Beverly Hills, California, addressed as aforesaid and [69] prepaid, shall constitute service of such notice on the Producer and the time of receipt of such notice by the Post Office as indicated on the registry receipt or the time of delivery of such notice to the telegraph or cable office as indicated by the telegraph or cable company on the copy of the telegram or cable, shall be the time of service of such notice. In the event that any such notice is mailed, telegraphed or cabled from a location other than those hereinabove specifically authorized, such notice shall not be effective until actually received by the addressee. Either party hereto may also (in lieu of or in addition to the aforementioned mailing, telegraphing or cabling) deliver any notice to the other party in writing personally.

25. In addition to the compensation elsewhere herein provided for, the Producer agrees to pay the Artist the sum of Five Hundred Dollars ($500.00) for each photoplay in which he renders any services hereunder as consideration for the use of the Artist's "western" wardrobe, his horse, "Trigger," (it being understood that the Artist may use one or more of several "Triggers"), special silver saddles, horse truck, and other equipment furnished by

the Artist in connection with the production of said photoplays (including his house trailer, if he should desire the use of a house trailer). The Artist agrees to furnish the equipment mentioned, including all such equipment as he has customarily furnished in the past, for said consideration.

26. The Producer agrees to give the Artist and his horse, "Trigger," top and first star billing on the positive prints of each photoplay in which the Artist appears hereunder, and to give the Artist and his horse, "Trigger," top and first star billing in all paid advertising and paid publicity issued by the Producer in connection therewith. Such billing need not appear before the title of the photoplay. No other member of the cast shall be given credit on said positive prints or in said advertising or publicity, in type as large as or larger than that [70] used for the name of the Artist, except that any co-star or co-stars may be given credit in type as large as that used for the Artist, and the name of such co-star or co-stars may appear on the same line as the name of the Artist. The Producer shall not have the right to give co-starring credit to any other member of the cast of any such photoplay without the Artist's consent; provided, however, that the Producer may, without the Artist's consent, co-star any star engaged by the Producer for the particular photoplay, who has been theretofore regularly starred or co-starred in photoplays regularly acceptable in de luxe or "A" motion picture theaters. The Producer shall not be obligated to give the Artist or his horse, "Trigger," credit in

so-called "teaser" or special advertising, or in advertising, publicity or exploitation relating to the story upon which the respective photoplay is based, any other members of the cast, the director, the author or similar matters, or in so-called "group" advertising, or in so-called "trailer" or other advertising on the screen, nor at any time when the Artist fails to conduct himself in the manner provided in Paragraph 5 hereof. No casual or inadvertent failure to give the Artist credit in advertising and publicity as provided in this paragraph shall constitute a breach of this agreement.

27. In consideration of the execution of this agreement by the Producer, the Artist hereby grants to the Producer the option to extend the employment of the Artist hereunder for an additional term of one (1) year from and after the expiration of the original term hereof, upon and subject to the same provisions set forth in this agreement (except as hereinafter provided), on condition, however, that at the time of exercising said option the Producer is not in default under this agreement. In the event that the Artist considers the Producer to be in default under this agreement at the time of exercising said option, the Artist shall notify the Producer thereof in writing within ten (10) days following service of the Producer's notice of exercise of [71] option, and shall specify in his notice, with particularity, the respects in which he considers the Producer to be in default. Should the Artist fail to serve such notice on the Producer within said period of ten (10) days the Producer shall not be deemed

to be in default hereunder insofar as its right to exercise said option is concerned, and said option shall be deemed to be validly exercised. If, having exercised said option, the Producer should be in default hereunder at the expiration of the original term, the Artist shall have the right to cancel the optional term by notifying the Producer in writing of the exercise of this right of cancellation not later than ten (10) days following the expiration of the original term. If any installment of compensation of the optional term shall become due during such ten (10) day period the Producer may withhold payment thereof until the expiration of such ten (10) day period, and if the Artist serves notice of exercise of such right of cancellation, such installment or installments shall, of course, not be payable. Such cancellation shall take effect as of the date of expiration of the original term, but the Producer shall continue to be entitled to the services of the Artist pursuant to Paragraph 12 hereof, if necessary. In the event that said option is exercised, the provisions of this agreement shall be deemed to be modified in the following respects during the optional term:

(a) The amount of compensation payable to the Artist for this optional term shall be the sum of One Hundred Thousand Dollars ($100,000.00), payable in fifty-one (51) installments of One Thousand Nine Hundred Twenty-Three Dollars and Eight Cents ($1,923.08), and one installment of One Thousand Nine Hundred Twenty-Two Dollars and Ninety-Two Cents

($1,922.92), weekly in the manner provided in Paragraph 11 hereof.

(b) The maximum number of photoplays for which the Producer shall be entitled to the Artist's services during this optional term shall be four (4); provided, however, that if the Artist is engaged in rendering services in connection with a photoplay hereunder at the expiration of the original term, and his services in such photoplay are not then completed, the Producer shall have the right to require the completion of such services in connection with such photoplay during the optional term and such photoplay [72] shall not be counted as one of said four (4) photoplays.

(c) All references in this agreement to Twenty-Two Thousand Two Hundred Twenty-two Dollars and Twenty-two Cents ($22,-222.22) shall be deemed to be changed to Twenty-Five Thousand Dollars ($25,000) insofar as this optional term is concerned.

Said option may be exercised at any time, but not later than ninety (90) days prior to the date of expiration of the original term. If said original term is extended by reason of the extension of any year of said term pursuant to any provision of this agreement, said period of ninety (90) days shall be computed from the expiration of the term as extended unless the right of extension is exercised subsequently to the date which would otherwise have been the commencement date of such ninety (90) day period, in which event such ninety (90)

day period shall be computed (for the purpose only, however, of determining the latest date for the exercise of said option) as though the right of extension had not been exercised. The exercise of said option by the Producer shall not be deemed to be a waiver by the Producer of any prior breach of this agreement by the Artist, whether known or unknown, or a ratification by the Producer of any prior course of conduct of the Artist. Notice of exercise of said option shall be in writing.

28. This agreement contains the entire contract between the parties hereto, and each party acknowledges that neither has made (either directly or through any agent or representative) any representations or agreements in connection with this employment not specifically set forth herein. This agreement may be modified or amended only by agreement in writing executed by the Artist and the Producer, and not otherwise.

29. All contracts of employment, and amendments thereto, heretofore entered into between the Producer and the Artist which have not already expired by reason of lapse of time or otherwise, including, but not limited to, that certain contract of employment between the Producer and the Artist (then known as Leonard Slye), [73] dated October 13, 1937, as amended, are hereby cancelled and terminated effective as of the date of execution of this agreement, and each of the parties thereto is hereby released from all further obligations, agreements, claims, demands and liabilities thereunder or with respect thereto except that the Producer is

not released from the obligation to give screen and advertising credit to the Artist to the extent and subject to the conditions provided in such contract or contracts. Specifically, but without limiting the generality of the foregoing, the Producer hereby releases the Artist from the obligation to render any further services under any such contract or contracts and from all liability or alleged liability for any breach or alleged breach of any such contract, and the Artist hereby releases the Producer from the obligation to pay any further conpensation to the Artist and from all liability with respect thereto under any such contract or contracts. Such termination of said contract or contracts is without prejudice to the retention by the Producer, and the Producer hereby expressly reserves, all of its rights in and to all of the results and proceeds of the services heretofore rendered by the Artist for the Producer, and its right to use the name, voice and likeness of the Artist for advertising and publicity purposes in connection with his motion pictures, and the Artist hereby acquiesces in and agrees to said reservation of rights.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

REPUBLIC PRODUCTIONS, INC.,

By /s/ [Indistinguishable],
Asst. Secy.

/s/ ROY ROGERS.

snr:md 2-27-48. [74]

EXHIBIT E

North Hollywood, California
December 19, 1949

Mr. Roy Rogers,
c/o Art Rush, Inc.,
Vine and Selma,
Los Angeles, California.

Dear Mr. Rogers:

The following will constitute our agreement amending as follows, for good and valuable consideration, that certain contract of employment between us, dated February 28, 1948, as amended:

1. We agree that you shall have one additional month free period during the original term of said contract, said additional free period to be the month of February, 1950. In consideration therefor, it is agreed that the optional term of said contract (to wit, the term provided for in Paragraph 27 of said contract, the option therefor having been exercised by us by notice, dated September 1, 1949), is hereby extended for a period of one month.

2. The foregoing extension shall have no effect on the amount, rate or time of payment of the compensation now provided for in said contract, as heretofore amended, and no compensation shall be payable to you with respect to said extension of one month. In other words, we shall be entitled to your services during said extension of one month and you agree to render such services (subject to the conditions and limitations specified in said contract

of employment, as heretofore amended) without additional compensation.

3. You have now rendered services in the production of ten (10) complete photoplays under said contract, leaving one additional photoplay for which we are entitled to your services during the original term of said contract. It is hereby agreed that we shall have the right to commence the production of said eleventh photoplay during said optional term, without affecting the number of photoplays for which we are entitled to your services during said optional term. In other words, we shall remain entitled to your services in six (6) photoplays during said optional term, in addition to said eleventh photoplay, subject, of course, to the terms and conditions of said contract, as amended. Pursuant to the [75] foregoing, production of said eleventh photoplay is presently scheduled to commence on March 1, 1950.

Except as expressly provided herein, said contract, as heretofore amended, is not changed or amended in any particular, and remains in full force and effect.

Kindly indicate your approval and acceptance of the foregoing by signing this agreement in the space provided below.

Yours very truly,

REPUBLIC PRODUCTIONS, INC.,

By /s/ [Indistinguishable.]

Approved and Accepted:

/s/ ROY ROGERS.

snr:dd 12-28-49. [76]

EXHIBIT F

June 8, 1951.

Mr. J. J. Van Nostrand, Jr., Vice Pres. Tel. Dir.,
Sullivan, Stauffer, Colwell & Bales, Inc.,
6253 Hollywood Boulevard,
Hollywood, California.

Dear Mr. Van Nostrand:

It is our pleasure to announce that we have the following pictures that are now available for television. Additional groups of pictures will be announced in the near future.

1. Roy Rogers Productions starring Roy Rogers and Trigger. (53½ min. ea.)

2. Gene Autry Productions starring Gene Autry, Gabby Hayes and an all star cast. (53½ min. ea.)

3. Red Ryder Productions starring Wild Bill Elliott, Rocky Lane, Gabby Hayes, and Bobby Blake as Little Beaver. (53½ min. ea.)

4. Family and Preferred DeLuxe Feature Productions with all star casts. (53½ min. ea.)

5. Pioneer Western Features starring the Three Mesquiteers. (53½ min. ea.)

6. Frontier and Lone Star Western Features starring Don Barry and Sunset Carson. (53½ min. ea.)

7. The Plainsmen Western Features starring Johnny Mack Brown and Bob Steele.

8. World's Greatest Serials—tailored per episode to the 30 minute spot (26½ min. ea.) or can be licensed in their original length of 18 to 24 minutes per episode.

All pictures will be licensed in groups of 13, 26 or 52.

So you can be among the first to see what we are offering for immediate televising you are cordially invited to a screening at Republic Studios, Tuesday, June 19th, at 2 p.m. (4024 Radford Avenue, North Hollywood).

No sales will be negotiated before June 25th so as to give everyone an equal opportunity.

Will you kindly acknowledge by phone or letter if you or your representative can be present at the above screening.

Very truly yours,

.....,

Earl R. Collins, Pres.,
Hollywood Television
Service, Inc.

ERC-mm

[Endorsed]: Filed July 3, 1951. [77]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff, and leave of Court having been first had and obtained, amends his Complaint as of the date of the filing of the Answer of defendants, Republic Productions, Inc., Republic Pictures Corporation and Hollywood Television Service, Inc., in the following respects, to wit:

(1) In the title or caption of the Complaint, delete the name "Doe One" and add the name "Republic Pictures Corporation, a New York corporation."

(2) In Paragraph IV of the Complaint, delete the name "Doe One" and at the end of Said Paragraph IV add the following two new sentences, to wit:

> "Plaintiff is informed and believes and therefore alleges that the defendant, Republic [78] Pictures Corporation is a corporation duly organized and existing under the laws of the State of New York and is a citizen of said State; that said defendant, Republic Pictures Corporation, will in this Complaint hereinafter, for convenience, be referred to as Republic Pictures or Defendant Republic Pictures. Plaintiff is informed and believes and therefore alleges that defendant, Republic, and defendant, Hollywood Television, are each wholly owned subsidiaries of defendant, Republic Pictures, and that said Republic Pictures claims some interest in the subject matter of this action."

(3) At the end of Paragraph XIII of the Complaint, add the following sentence, to wit:

"Plaintiff is informed and believes and therefore alleges that between on or about February 1, 1950, and June 8, 1951, the date of said letter offer, defendants declared that they had the right to televise for the purpose of commercial advertising, the motion pictures starring the plaintiff and his horse, Trigger, and during said period from time to time announced their intention to so televise said motion pictures, or authorize others to so televise said motion pictures, without the consent of and contrary to the rights of plaintiff."

(4) In the middle of Paragraph XVI of the Complaint, delete the words "the defendant, Republic and the defendant, Hollywood Television, or one of them," and insert in lieu thereof the words "the defendants, Republic Pictures and Hollywood Television, with the knowledge and acquiescence of Republic." [79]

(5) In the first sentence of Paragraph XVII of the Complaint delete the words "Republic and Hollywood Television," and in the second sentence of said Paragraph XVII delete the words "and malicious" in both instances where said words appear.

(6) At the end of Paragraph XIX of the Complaint add the following sentence, to wit:

"For the same reasons defendant, Republic Pictures, has also so waived any such rights

which it might otherwise have had or claimed to have had."

(7) At the end of Paragraph XX of the Complaint, add the following sentence, to wit:

"For the same reasons defendant, Republic Pictures, is also so estopped."

(8) In the first part of Paragraph XXI of the Complaint, delete the words "defendant, Republic, and has" and insert in lieu thereof "defendant, Republic Pictures, and that both Republic Pictures and the said Hollywood Television"; and in the latter part of Paragraph XXI, delete the words "the said Hollywood Television's use" and insert in lieu thereof the words "the said Republic Pictures or Hollywood Television's use."

(9) In the first part of Paragraph XXIII of the Complaint, delete the words "That the above-mentioned threats of defendants, Republic and Hollywood Television," and insert in lieu thereof "The threats of defendants."

(10) Delete all of Paragraph XXIV.

(11) In Paragraphs (1), (2), (3) and (4) of the prayer of the Complaint, insert the words "Republic Pictures Corporation" just ahead of the words "Republic Productions, Inc."

(12) Delete Paragraph (5) of the prayer of the Complaint and in lieu thereof insert the following:

"(5) For damages in the amount of One Hundred [80] Thousand Dollars ($100,000) and

such additional amounts of damages as may have accrued to the date of the rendition of judgment herein."

GIBSON, DUNN &
CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
SAMUEL O. PRUITT, JR.,
RICHARD H. WOLFORD,
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff.

It Is Hereby Stipulated by and between counsel for the respective parties that the foregoing Amendment to the Complaint may be filed and that the allegations thereof, except to the extent that they are admitted by the Answer of the defendants now on file, shall be deemed to be denied by said defendants.

GIBSON, DUNN &
CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
SAMUEL O. PRUITT, JR.,
RICHARD H. WOLFORD,
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff.

FRANK B. BELCHER,
LOEB AND LOEB,
By /s/ HERMAN F. SELVIN,
Attorneys for Defendants.

It Is So Ordered. October 3, 1951.

/s/ PEIRSON M. HALL,
Judge of the United States
District Court.

[Endorsed]: Filed October 3, 1951. [81]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having duly come on for trial on Thursday, the 13th day of September, 1951, at the hour of 10:00 o'clock a.m., before the Honorable Peirson M. Hall, Judge Presiding; Frederic H. Sturdy, Esq., Samuel O. Pruitt, Jr., Esq., and Richard H. Wolford, Esq., of Gibson, Dunn & Crutcher, appearing as counsel for the plaintiff, and Herman F. Selvin, Esq., and Harry L. Gershon, Esq., of Loeb & Loeb, and Frank B. Belcher, Esq., of Jennings & Belcher, appearing as counsel for defendants, and the trial having been concluded on Friday, October 12, 1951, and oral argument by counsel for the respective parties having been concluded on Wednesday, October 17, 1951, and the cause having been submitted to the Court on the latter date, and the Court having heard and considered the evidence both oral and documentary offered by the respective parties, and the Court, in open court, having orally announced its decision in favor of the plaintiff on October 18, 1951, and being

fully advised [82] in the premises the Court now makes its Findings of Fact as follows:

Findings of Fact

(1) The plaintiff, Roy Rogers, was at the time of the commencement of the within action and now is a citizen and resident of the County of Los Angeles, State of California.

(2) The defendant, Republic Productions, Inc., was at the time of the commencement of the within action and now is a corporation duly organized and existing under the laws of the State of New York and is a citizen of said State. The defendant, Hollywood Television Service, Inc., was at the time of the commencement of the within action and now is a corporation duly organized and existing under the laws of the State of Delaware and is a citizen of said State. Said defendant, Hollywood Television Service, Inc., was organized on or about November, 1950, for the express purpose of selling, leasing, or otherwise distributing through the medium of television, certain of the motion pictures formerly produced by the defendant Republic Productions, Inc. The defendant Republic Pictures Corporation was at the time of the commencement of the within action and now is a corporation duly organized and existing under the laws of the State of New York and is a citizen of said State. The defendants Republic Productions, Inc., and Hollywood Television Service, Inc., were at the time of the commencement of the within action and now are each wholly owned subsidiaries of defendant Republic Pictures Cor-

poration. The rights of defendants Republic Pictures Corporation and Hollywod Television Service, Inc., and each of them, insofar as the subject matter of this action is concerned, are no greater than and are subject to at least the same limitations as the rights of defendant Republic Productions, Inc.

(3) The within action is a civil action wherein the matter in controversy exceeds the sum or value of Three Thousand Dollars ($3,000.00) exclusive of interest and costs. [83]

(4) Plaintiff adopted the name "Roy Rogers" for all professional purposes in early 1938 and has at all times since said date been known professionally as Roy Rogers. By change of name proceedings plaintiff caused his name to be formally and legally changed to "Roy Rogers" in 1942. As against the defendants in this action and each of them and anyone claiming through or under them, or any of them, the plaintiff is the sole and exclusive owner of his name "Roy Rogers" and his voice and likeness and of the name and likeness of his horse "Trigger" for any and all commercial advertising purposes whatsoever, as said term "commercial advertising purpose" is defined in Finding No. 13.

(5) Plaintiff has been for many years and now is an internationally known motion picture, stage, radio and rodeo star and has achieved and maintained for many years and now has a great and widespread fame and prominence as an actor, singer, rodeo performer, horseman and personality.

Plaintiff has been for many years and now is well known and identified in the public mind throughout the United States and many foreign countries as "Roy Rogers." Plaintiff's fame as a western star has been and now is such that at all times since 1942 he has also been and now is well known and identified in the public mind as "King of the Cowboys."

(6) On or about October 13, 1937, the plaintiff Roy Rogers whose true name was then Leonard Slye, entered into a written Agreement with the defendant Republic Productions, Inc. Said Agreement was and is in printed form, except for a few typewritten words and figures, and was prepared by counsel for the defendants Republic Productions, Inc., and Republic Pictures Corporation. At and before the time of the signing of said Agreement the plaintiff was not represented by any attorney or agent acting for or on behalf of plaintiff. A full, true and correct copy of said Agreement was offered and received in evidence as plaintiff's Exhibit No. 17 and is attached hereto marked Exhibit A and made a part hereof, and [84] for convenience and brevity will hereinafter in these Findings sometimes be referred to as the "1937 Agreement." By various letter agreements, which the Court finds to be immaterial to the dispute herein involved, the term of the 1937 Agreement was extended to on or about February 28, 1948.

(7) During the term of the 1937 Agreement the defendant Republic Productions, Inc., produced

a total of sixty-three (63) motion pictures in each of which the plaintiff Roy Rogers was starred in the leading male role. A true and correct list of the titles of said motion pictures and the dates of completion of photography thereof is set forth in Exhibit B which is attached hereto and made a part hereof.

(8) On or about March 9, 1948, the plaintiff Roy Rogers entered into a written Agreement with the defendant Republic Productions, Inc. A full, true and correct copy of said Agreement, which bears the date of February 28, 1948, was offered and received in evidence as plaintiff's Exhibit No. 20 and is attached hereto marked Exhibit C and made a part hereof, and for convenience and brevity will hereinafter in these Findings sometimes be referred to as the "1948 Agreement." The term of said 1948 Agreement commenced on March 1, 1948, and ended on or about May 27, 1951.

(9) During the term of the 1948 Agreement the defendant Republic Productions, Inc., produced a total of eighteen (18) motion pictures in each of which the plaintiff Roy Rogers was starred in the leading male role. A true and correct list of the titles of said motion pictures and the dates of completion of photography thereof is set forth in Exhibit D which is attached hereto and made a part hereof.

(10) During the period of time covered by the terms of the 1937 Agreement and the 1948 Agreement or one of them, in addition to the eighty-one (81) motion pictures in which the plaintiff was starred (listed in Exhibits B and D hereto), the defendant Republic [85] Productions, Inc., produced four (4) feature length motion pictures entitled respectively, "Dark Command," "Lake Placid Serenade," "Brazil" and "Hit Parade of 1947," in each of which the plaintiff appeared incidentally but did not star and during the term of the 1937 Agreement the plaintiff appeared in two (2) additional feature length motion pictures entitled respectively "Hollywood Canteen" and "Melody Time," which two motion pictures were produced by motion picture producers (not parties to this suit) pursuant to the "loan-out" provisions of the 1937 Agreement.

(11) During the period 1938 to 1951, both inclusive, plaintiff has, with the knowledge and encouragement of defendants Republic Productions, Inc., and Republic Pictures Corporation, made substantially in excess of 640 personal appearances, more than 563 rodeo appearances and substantially in excess of 242 radio appearances. Said defendants and plaintiff have from time to time each expended large sums of money in publicizing plaintiff in connection with some of said appearances. Through the expenditure of said sums of money, but primarily through and because of his own personality, industriousness, ability, performance, and exem-

plary personal conduct and private life, plaintiff has built up and maintained over a period of many years, and he now enjoys in the mind of the public, a great and widespread popularity, trust, good will, confidence and esteem for himself personally and for his name "Roy Rogers."

(12) For more than thirteen (13) years plaintiff has continuously used a horse named "Trigger" in his various professional appearances, as well as certain "doubles" for said horse which doubles have also been known as "Trigger"; and the said name and horse "Trigger" has been during said entire period and now is associated in the public mind exclusively with the plaintiff Roy Rogers. For many years the said Trigger and said doubles have been and they now are owned, maintained and trained by the plaintiff at his own sole cost and expense. The rights of the respective parties to the [86] within action, as herein determined, apply equally both to Roy Rogers and to Trigger, and hereinafter in these Findings, for convenience and brevity, all references to the use of, or the rights or obligations of the parties hereto with respect to the use of, the name, voice and likeness (or any thereof) of plaintiff shall also be deemed to include and apply equally to the name and likeness (or either thereof) of plaintiff's horse Trigger.

(13) The term "advertising, commercial and/or publicity purposes" as used in the fourth sentence of paragraph 4 of the 1937 Agreement and the terms "commercial advertising" and "commercial tie-up"

as used in subparagraph (B) of paragraph 4 of the 1948 Agreement were intended by the parties to be and they are synonymous with the term "commercial tie-ups for products of every kind or character (other than motion pictures)" as used in subparagraph (C) of paragraph 4 of said 1948 Agreement. Said terms were each intended to mean, and throughout the terms of the said 1937 Agreement and the said 1948 Agreement (until on or about February 1, 1950) were construed by the parties by their acts and conduct to mean, and they do mean any use whatsoever of the name, voice or likeness of the plaintiff Roy Rogers (whether in still photographs or in motion pictures or otherwise or at all, and whether used as a trade name or as an endorsement, either direct or implied, or as a so-called "attention-getter" or otherwise or at all, and whether used on or in radio, television, newspapers, magazines, billboards, car cards or any other advertising medium or media whatsoever) in association with or to advertise or otherwise promote any service or product whatsoever except only (a) the defendant Republic Productions, Inc., as a producer of motion pictures and/or (b) any of the motion pictures produced by said defendant under either the 1937 Agreement or the 1948 Agreement. For convenience and brevity said terms and the meaning thereof, as in this Finding defined and limited, shall hereinafter (in these Findings and Conclusions and in the Judgment to be entered herein) be referred to as "commercial advertising" or "commercial advertising [87] purposes"; pro-

vided however, that for the reasons set forth in Findings Nos. 39 and 41, said terms "commercial advertising" and "commercial advertising purpose" as used in these Findings and Conclusions and in the Judgment to be entered herein, do not include the use as feature length motion pictures of any of the following four (4) feature length motion pictures produced by defendant Republic Productions, Inc., and in which the plaintiff incidentally appeared but did not star: "Dark Command," "Lake Placid Serenade," "Brazil" and "Hit Parade of 1947," and likewise do not include the use of any of the eighty-one (81) feature length motion pictures listed in Exhibits B and D hereto in theaters or any other place where an admission fee is or has been customarily charged for the entertainment or for admission to the entertainment (either in the customary manner by a projector in such place or by means of a television transmission or projection onto a screen or screens in such place) or on television screens where a fee is charged to the viewers of such screens for the privilege of viewing such motion pictures, even though some incidental advertising may also be shown on the screens in said theaters or other places or on said television screens.

(14) In 1938, the plaintiff, Roy Rogers, commenced a business based upon the use of his name, voice and likeness for commercial advertising purposes. In the development and maintenance of plaintiff's said commercial advertising business the plaintiff has at all times exercised great care, dili-

gence and discretion in determining the number, type, character and quality of the products and services with which he has permitted his name, voice or likeness to be associated, and at no time has plaintiff recommended, approved or endorsed, either directly or impliedly, or permitted his name, voice or likeness to be associated with or used in connection with, any products or services except those which the plaintiff, in good faith, believed to be of good quality, suitable for safe purchase and use by the public, and of a character consistent with his widespread reputation as a wholesome cowboy of high moral character.

(15) At all times since early 1938, the plaintiff has, [88] with the knowledge, encouragement and consent of the defendants, Republic Productions, Inc., and Republic Pictures Corporation, asserted and exercised exclusive control over, and the exclusive right to receive and retain and plaintiff has received and retained any and all monetary consideration from, the use of his name, voice or likeness for commercial advertising purposes.

(16) At all times since 1938, whenever anyone, including but not limited to the defendants, Republic Productions, Inc., and Republic Pictures Corporation, has ever desired to use or authorize others to use plaintiff's name, voice or likeness for any commercial advertising purpose, all of said persons, including said defendants, have always first requested the consent of plaintiff before making such use, and plaintiff has always controlled the granting

of such consents; provided however that from and after on or about February 1, 1950, the defendants, Republic Productions, Inc., Republic Pictures Corporation and Hollywood Television Services, Inc., made the various claims set forth in Findings Nos. 18, 19 and 47, respectively.

(17) Plaintiff's said commercial advertising business has been and now is of very great value and has in each year since 1945, and now is producing for him a substantially greater income than he has received in like periods for rendering services in motion picture work. The great value of said commercial advertising business, and the great value of plaintiff's name, voice and likeness for commercial advertising purposes, is to a very large extent due to the continuous discretion, care and control which plaintiff has always exercised in determining the extent to which, the manner in which and the product or service for or in connection with which his name, voice and likeness have been used for commercial advertising purposes, and the continued value of plaintiff's said commercial advertising business is directly dependent upon a continuance of such exclusive control by the plaintiff.

(18) On or about June 8, 1951, the defendant, Hollywood [89] Television Service, Inc., with the knowledge, consent and acquiescence of Republic Productions, Inc., and Republic Picture Corporation, caused to be mailed a letter, dated June 8, 1951, (a true and correct copy of which was offered and received in evidence as Plaintiff's Exhibit No.

30) to various advertising agencies and to various television networks and stations and thereby offered (for a valuable consideration to be paid to said defendant) for immediate telecasting certain of the said eighty-one (81) motion pictures listed in Exhibits B and D; and on or about June 19, 1951, and again on June 20, 1951, the defendant, Hollywood Television Service, Inc., with the knowledge, consent and acquiescence of defendants, Republic Productions, Inc., and Republic Pictures Corporation, reiterated its offer of said pictures (for a valuable consideration to be paid to said defendant) for immediate telecasting and offered to license said motion pictures in groups of thirteen (13), twenty-six (26) or fifty-two (52) and said offers contemplated that the name, voice and likeness of plaintiff, Roy Rogers, if the licensees of said motion pictures so desired, be regularly, repetitiously and systematically telecast to the viewing and listening public, free of charge, to such viewing and listening public, for commercial advertising purposes; and said offers also contemplated the customary, systematic and repetitious use of plaintiff's name and likeness in newspapers and other advertising media regularly and customarily used to advertise a licensee's or sponsor's program and the services or products advertised thereon. Said offers contemplated that all of said motion pictures would be reedited and shortened so that they each would have a running time of approximately fifty-three and one-half (53½) minutes and would therefore be made suitable for use on a one (1) hour television pro-

gram. The prices quoted by defendant, Hollywood Television Services, Inc., were quoted for said motion pictures in groups of thirteen (13), twenty-six (26) or fifty-two (52) at the rate of $30,000 per picture for one nationwide [90] telecast or $50,000 per picture for two such telecasts.

(19) Prior to the commencement of the within action, the plaintiff formally demanded that the defendants withdraw the written offer of June 8, 1951, and the additional oral offers of June 19, and 20, 1951, but defendants refused to comply with said demand, and said defendants then and at all times since have claimed and now claim that they have the absolute and unrestricted right to utilize and authorize others to utilize all or any of the motion pictures produced by defendant, Republic Productions, Inc., and in which the plaintiff appeared and any portions or portion thereof, in any manner and for any purpose or purposes whatsoever.

(20) The first sentence of Paragraph 4 of the 1937 Agreement was intended by the parties thereto to set forth and it does set forth the full extent of the only perpetual right granted by plaintiff to defendant, Republic Productions, Inc., to use or authorize others to use plaintiff's name, voice or likeness (whether in still photographs or in motion pictures or otherwise or at all) in or in connection with the advertising of any service or product whatsoever, and the parties intended said perpetual advertising right to be limited and it was limited

solely to the advertising of the defendant, Republic Productions, Inc., as a producer of motion pictures and any of the motion pictures produced by Republic Productions, Inc., under said 1937 Agreement.

(21) During the term of the 1937 Agreement, the sole and exclusive right to use plaintiff's name, voice and likeness for commercial advertising purposes was expressly and intentionally recognized and acknowledged by defendants, Republic Productions, Inc., and Republic Pictures Corporation, to be in, and was granted to, the plaintiff in lieu of additional salary and also in consideration of the substantial and valuable publicity and advertising which defendants, Republic Productions, Inc., and Republic Pictures Corporation, received from plaintiff in the course of the exercise by [91] plaintiff of said commercial advertising rights and as a result of plaintiff's other outside activities such as rodeos and other types of personal appearances in each and all of which plaintiff required and secured publicity and advertising for said defendants.

(22) By the 1948 Agreement, the parties thereto intended to and did terminate the 1937 Agreement as of on or about February 28, 1948, and intended to and did as of said date terminate all rights of defendant, Republic Productions, Inc., under said 1937 Agreement except those specifically reserved in the last sentence of Paragraph 29 of said 1948 Agreement.

(23) By the 1948 Agreement, and especially by the last sentence of paragraph 29 thereof, the

parties thereto understood, intended to agree and did agree with respect to all results and proceeds of the plaintiff's services under the 1937 Agreement (including but not limited to the sixty-three (63) motion pictures listed in Exhibit B) that the only right reserved by said defendant to use plaintiff's name, voice or likeness (whether in still photographs or in motion pictures or otherwise or at all) for advertising purposes was to be limited, and it was limited, solely to the advertising of the defendant Republic Productions, Inc., as a producer of motion pictures and of any of the motion pictures produced by Republic Productions, Inc., under either the said 1937 Agreement or said 1948 Agreement.

(24) By the 1948 Agreement, the parties thereto intended to and did recognize and acknowledge that the 1937 Agreement did not give Republic Productions, Inc., any perpetual right to use plaintiff's name, voice or likeness (whether in still photographs or in motion pictures or otherwise or at all) for commercial advertising purposes.

(25) The second sentence of subparagraph (A) of paragraph 4 of the 1948 Agreement was intended by the parties thereto to set forth and it does set forth the full extent of the only perpetual right granted by plaintiff to defendant Republic Productions, Inc., [92] to use or authorize the use of plaintiff's name, voice or likeness (whether in still photographs or in motion pictures or otherwise or at all) in or in connection with the advertising of

any service or product whatsoever, and the parties intended said perpetual advertising right to be limited and it was limited solely to the advertising of the defendant Republic Productions, Inc., as a producer of motion pictures and of any of the motion pictures produced by Republic Productions, Inc., under either the 1937 Agreement or under said 1948 Agreement.

(26) Subparagraph (B) of paragraph 4 of the 1948 Agreement was intended by the parties thereto to set forth and it does set forth the sole and only right granted by plaintiff to defendant Republic Productions, Inc., to use or authorize others to use plaintiff's name, voice or likeness for commercial advertising purposes and said subparagraph (B) was intended by the parties to and it does restrict and limit the right of the defendant Republic Productions, Inc., to use or authorize others to use the name, voice or likeness of plaintiff (whether in still photographs or in motion pictures or otherwise or at all) in or in connection with advertising.

(27) The paragraphs numbered "2" in the 1937 and 1948 Agreements, respectively, including but not limited to the definitions of "photoplays" appearing therein, were not intended to be and are not a grant of any rights in any of the motion pictures produced under either of said Agreements or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, and in any event were not intended to and do not grant any adver-

tising rights whatsoever. The words "television" and "television devices" appearing in the said definitions are synonymous and were not intended to and do not refer to or grant to the defendant Republic Productions, Inc., any right to telecast or broadcast for commercial advertising purposes any of the eighty-one (81) motion pictures (listed in Exhibits B and D hereto) or any scene or sound track therefrom or any other portion [93] thereof in which the name, voice or likeness of plaintiff appears or is used on either a "sustaining" basis or a "commercially sponsored" basis as said words "sustaining" and "commercially sponsored" are hereinafter defined in Findings Nos. 29 and 31.

(28) At the respective dates of execution of the 1937 Agreement and the 1948 Agreement, the parties intended the provisions therein in any way relating to "advertising, commercial and/or publicity purposes," "commercial advertising" and "commercial tie-ups" to be, and by their acts and conduct during the respective terms thereof construed said provisions to be, and said provisions were and are a limitation upon any and all of the provisions in either of said Agreements in any way relating to television productions, or to the broadcasting or transmission of plaintiff's name, voice or likeness by means of television, radio or otherwise, or to the exhibition or transmission of motion pictures by radio, television or other devices.

(29) A "sustaining" program is a program which is telecast or broadcast under the sponsor-

ship of and at the expense of the station or network presenting the program and where no announcements advertising any product or service (other than the station or network) are made or shown during or directly in connection with such programs, although so-called "station break commercials" may and customarily are made or shown immediately before, during, or immediately following such sustaining programs at the time when the so-called "station break" announcements identifying the station or network are made or shown.

(30) The use of any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used on either a sustaining television or sustaining radio program would be primarily for the purposes of advertising the station or network presenting such program, of attracting and building up a listening and/or viewing audience for the program [94] and the time period allotted to the program, and of selling such program and allotted time to a commercial sponsor or sponsors, and such use would be for commercial advertising purposes.

(31) A "commercially sponsored" program is one which is telecast or broadcast under the sponsorship of and at the expense of one or more sponsors and where announcements advertising the products or services of such one or more sponsors

(other than merely the station or network over which the program is being telecast or broadcast) are made or shown at one or more times during or in connection with the program, and as used in these Findings includes so-called "participating" programs, to wit, programs, the entertainment portions of which are furnished by the station or network and during or in connection with which so-called "spot commercials" advertising products or services of two or more sponsors (other than merely the station or network over which the program is being telecast or broadcast) are made or shown at various times.

(32) The telecasting or broadcasting of any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, or of any still photograph of plaintiff or any recording of plaintiff's voice, on either a sustaining or commercially sponsored basis, or the use of plaintiff's name, voice or likeness in any other advertising medium or media to advertise any service or product whatsoever (except only Republic Productions, Inc., as a producer of motion pictures and any of the motion pictures produced by Republic Productions, Inc., under either the 1937 Agreement or the 1948 Agreement) would constitute a use of plaintiff's name, voice or likeness for commercial advertising purposes.

(33) The telecasting or broadcasting of any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the [95] name, voice or likeness of plaintiff appears or is used, or of any still photograph of plaintiff or any recording of plaintiff's voice, on either a sustaining or commercially sponsored basis, or the use of plaintiff's name, voice or likeness in any other advertising medium or media, to advertise any service or product whatsoever (except only Republic Productions, Inc., as a producer of motion pictures and any of the motion pictures produced by Republic Productions, Inc., under either the 1937 Agreement or the 1948 Agreement) would constitute a use of plaintiff's name, voice or likeness in a "commercial tie-up" of the type reserved exclusively to plaintiff by the 1948 Agreement.

(34) The telecasting or broadcasting of any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, or of any still photograph of plaintiff or any recording of plaintiff's voice, on a commercially sponsored basis, or the use of plaintiff's name, voice or likeness in any other advertising medium or media to advertise any service or product whatsoever would cause an association in the minds of the viewing and/or listening public between the plaintiff's name, voice or likeness and the product or service being advertised.

(35) The telecasting or broadcasting of any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, or of any still photograph of plaintiff or any recording of plaintiff's voice, on a sustaining basis, would cause an association in the minds of the viewing and/or listening public between the plaintiff's name, voice or likeness and the station or network presenting the program.

(36) The telecasting or broadcasting of any of the eighty-one [96] (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, or of any still photograph of plaintiff or any recording of plaintiff's voice, on a commercially sponsored basis, or the use of plaintiff's name, voice or likeness in any other advertising medium or media to advertise any service or product whatsoever, would create in the minds of the viewing and/or listening public the belief that the plaintiff approved, endorsed or recommended the product or service of such sponsor or other advertiser.

(37) The telecasting or broadcasting of any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is

used, or of any still photograph of plaintiff or any recording of plaintiff's voice, on a sustaining basis would create in the minds of the viewing and/or listening public the belief that the plaintiff approved, endorsed or recommended the station or network presenting the program.

(38) The principal value to a commercial sponsor or station or network in telecasting or broadcasting any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, would be in the name, reputation and sincerity of the plaintiff; and it would be the primary aim, intent, and hope of any such commercial sponsor or station or network to favorably associate the name and reputation of the plaintiff with the sponsor's service or product and to indicate to the public either directly or indirectly that the plaintiff approves, recommends or endorses the said service or product and to trade on the name and good will which the plaintiff has built up over a period of [97] many years and to capture for such sponsor's service or product as great a portion as possible of the good will which attaches to the name, voice and likeness of Roy Rogers.

(39) The defendants do not have any right whatsoever (under either the 1937 Agreement or the 1948 Agreement or otherwise or at all) to use the name, voice or likeness of plaintiff (whether

in still photographs or in motion pictures or otherwise or at all) for commercial advertising purposes; and without in any way limiting the generality of the foregoing, the Court expressly finds that the defendants, and each of them, do not have any right whatsoever (under either the 1937 Agreement or the 1948 Agreement or otherwise or at all) to telecast or broadcast or to authorize others to telecast or broadcast for commercial advertising purposes any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, on either a sustaining or commercially sponsored basis. As to the four (4) motion pictures referred to in Finding No. 10, to wit, "Dark Command," "Lake Placid Serenade," "Brazil" and "Hit Parade of 1947," in each of which the plaintiff appeared incidentally but did not star, the plaintiff in open court waived any right that he otherwise would have had to prevent the showing of said feature length motion pictures for advertising purposes so long as they are shown substantially in their entirety and as feature length motion pictures, but defendants may not use any scene or sound track or any other portion of said four (4) feature length motion pictures in which the name, voice or likeness of plaintiff appears or is used if said scene, sound track, or other portion is used out of context or in any other manner than as an integral part of the said feature length mo-

tion pictures. By reason of said waiver, the use of said four (4) feature length motion pictures or any of them as feature length motion pictures, was excluded from the definition of the phrases "commercial advertising" and "commercial advertising purpose" set forth in Finding [98] No. 13.

(40) The 1948 Agreement and in particular the provisions of subparagraph (C) of paragraph 4 thereof, in recognizing and reserving to the plaintiff the exclusive right to enter into commercial tie-ups and to freely exercise such right, gave rise to an implied negative convenant on the part of defendant Republic Productions, Inc., and anyone claiming through or under it, not to use plaintiff's name, voice or likeness, either in still photographs or in motion pictures or otherwise or at all for commercial advertising purposes.

(41) Incidental advertising where the viewing and listening audience has paid the customary admission fee or charge for the entertainment or for admission to the entertainment and the effect of such incidental advertising on such audience, are substantially and materially different and are not the same as advertising and the effect thereof where no admission fee or charge is made to the viewing and listening audience and the entertainment is brought to the viewing and listening audience by an advertiser, station or network without cost to the viewing or listening audience and the parties hereto did not intend to include such incidental advertising and it was not included within

the terms "advertising, commercial and/or publicity purposes," "commercial advertising" and "commercial tie-ups," or any thereof, as such terms were used in either the 1937 Agreement or the 1948 Agreement, for which reasons such incidental advertising is excluded from the definition of "commercial advertising" and "commercial advertising purpose" set forth in Finding No. 13.

(42) The purported copyrighting of the motion pictures produced by the defendant Republic Productions, Inc., under either the 1937 Agreement or the 1948 Agreement is immaterial to any issue in this action and in any event did not alter the relationship and the rights and obligations between plaintiff and defendants which are the subject matter of this action, and to the extent that said copyrights purport to include any right hereunder found to exist in plaintiff [99] are held in trust by defendants for the benefit of plaintiff.

(43) The defendant Republic Pictures Corporation and defendant Hollywood Television Service, Inc., and each of them, have at all times had full notice and knowledge of plaintiff's exclusive right to and control over the use of his name, voice and likeness for commercial advertising purposes and likewise have at all times had full notice and knowledge of the fact that defendant Republic Productions, Inc., had no right, license, authority or consent to use or authorize others to use plaintiff's name, voice or likeness for commercial advertising purposes.

(44) Upon the termination of the 1948 Agreement on or about May 27, 1951, any and all right, license, authority or consent which any of the defendants may theretofore have had or claimed to have had with respect to the use of plaintiff's name, voice or likeness (whether in still photographs or in motion pictures or otherwise or at all) for commercial advertising purposes wholly ceased and terminated.

(45) At all times until on or about February 1, 1950, the defendants Republic Productions, Inc., and Republic Pictures Corporation represented to the plaintiff that they considered the television and motion picture industries to be competitive and mutually exclusive and that neither a motion picture artist nor a motion picture producer could serve both the motion picture and television industries; and at all times prior to said date said defendants represented to plaintiff that they had no intention or desire to telecast and would not telecast any of the motion pictures produced by Republic Productions, Inc., under either the 1937 Agreement or the 1948 Agreement.

(46) It is not true that the defendant Republic Productions, Inc., in the negotiations leading up to the execution of the 1948 Agreement ever requested, or that the plaintiff ever agreed to grant to said defendant, the unqualified right to telecast [100] either the motion pictures theretofore produced under the 1937 Agreement or the additional motion pictures to be produced under the 1948 Agreement.

On the contrary, the Court expressly finds from said negotiations, from the provisions of the 1948 Agreement, from the conduct of the parties, and from the parties' mutual construction and interpretation of the 1937 Agreement and the 1948 Agreement, that the parties to said 1948 Agreement understood, intended and agreed that plaintiff was to have the sole and exclusive right to and the control over the use of his name, voice and likeness for commercial advertising purposes, and that said exclusive right and control in plaintiff was not intended to be limited, and was not limited to plaintiff's name, voice or likeness outside of motion pictures but was intended by the parties to include plaintiff's name, voice and likeness whether in still photographs or in motion pictures or otherwise or at all.

(47) At no time prior to on or about February 1, 1950, did the defendants, or any of them, ever claim the right to use any of the motion pictures produced by the defendant Republic Productions, Inc., under either the 1937 Agreement or the 1948 Agreement, or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, for any commercial advertising purpose. The first time any such claim was made by any of the defendants was on or about February 1, 1950, at which time the defendant Republic Productions, Inc., did claim such right, and plaintiff thereupon immediately advised said defendant that it had no right to use

any of said motion pictures or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, for commercial advertising purposes, and that its rights in said motion pictures were subject and subordinate to plaintiff's exclusive right to use his name, voice and likeness for commercial advertising purposes. Whenever in these Findings, [101] reference is made to the parties' mutual construction or mutual interpretation of the 1937 and 1948 Agreements by their acts and conduct, such reference shall be understood to mean the acts and conduct of the parties beginning in 1937 and extending continuously throughout the terms of the 1937 and 1948 Agreements until on or about February 1, 1950.

(48) At all times from about 1938 until on or about February 1, 1950, defendants Republic Productions, Inc., and Republic Pictures Corporation, and each of them, by their acquiescense, representations and conduct represented to, encouraged, led and permitted the plaintiff to believe, and he did believe, that he had the sole and exclusive right to use and authorize others to use his name, voice and likeness (whether in still photographs or in motion pictures or otherwise or at all) for commercial advertising purposes and to receive and retain all monetary consideration therefrom, and said defendants intended that plaintiff should rely upon such acquiescence, representations and conduct, and plaintiff did so rely, and in reliance thereon has

heretofore over a long period of years developed a large and valuable commercial advertising business based upon the licensing of his name, voice and likeness for commercial advertising purposes and has expended a great amount of time, effort and money in the development of said business and has entered into or authorized others to enter into numerous valuable contracts with third parties whereby for a consideration, but always subject to the control of plaintiff, said third parties were authorized to use plaintiff's name, voice or likeness in or in connection with the advertising of the service or product of such licensed persons. As hereinbefore found, the plaintiff was granted and encouraged by defendants to exploit said commercial advertising rights in lieu of additional salary and also in consideration of the substantial and valuable publicity and advertising which defendants Republic Productions, Inc., and [102] Republic Pictures Corporation received from plaintiff in the course of the exercise by plaintiff of said commercial advertising rights and as a result of plaintiff's other outside activities such as rodeos and other types of personal appearances.

(49) Now to permit the defendants Republic Productions, Inc., and Republic Pictures Corporation, or either of them, or anyone claiming under or through said defendants or either of them, to assert or exercise any right whatsoever to use or authorize others to use plaintiff's name, voice or likeness (whether in still photographs or in motion pictures

or otherwise or at all) for commercial advertising purposes would cause plaintiff immediate, substantial and irreparable damage and would also immediately and substantially damage those licensed by plaintiff, for each of which reasons said defendants Republic Productions, Inc., and Republic Pictures Corporation, and each of them, and any and all persons claiming through or under them or either of them, including but not limited to the defendant Hollywood Television Service, Inc., are and each of them is estopped now to claim or assert or exercise any right, license or authority which they might otherwise have had or claimed to have had to use or authorize others to use the name, voice or likeness of plaintiff (whether in still photographs or in motion pictures or otherwise or at all) for commercial advertising purposes.

(50) The defendants Republic Productions, Inc., and Republic Pictures Corporation and each of them, prior to the commencement of the within action, waived any right, license or authority which they or either of them might otherwise have had or claimed to have had to use or authorize others to use the name, voice or likeness of plaintiff (whether in still photographs or in motion pictures or otherwise or at all) for commercial advertising purposes, first, by their conduct, second, in lieu of additional salary, third, in consideration of the substantial and valuable publicity [103] and advertising which defendants Republic Productions, Inc., and Republic Pictures Corporation received from plaintiff in

the course of the exercise by plaintiff of said commercial advertising rights and as a result of plaintiff's other outside activities such as rodeos and other types of personal appearances, and fourth, by the express provisions of the 1948 Agreement.

(51) At no time during the term of either the 1937 Agreement or during the term of the 1948 Agreement, did the defendant Republic Productions, Inc., request or call upon plaintiff to render any services in any so-called "television productions" or in connection with the broadcasting or transmission of his name, voice or likeness by means of television or broadcasting or in the production, exhibition or transmission of motion pictures by means of television or radio, nor did plaintiff render any such services. On the contrary, such services as were requested by the defendant Republic Productions, Inc., and rendered by plaintiff were solely in connection with the making of motion pictures which were produced for exhibition to the public upon the payment of an admission fee or charge, and such services were neither requested by said defendant Republic Productions, Inc., nor rendered by plaintiff for use for commercial advertising purposes.

(52) Immediate, substantial and irreparable damage and injury will be inflicted upon plaintiff if defendants are permitted to pursue their presently contemplated and threatened course of conduct and telecast or authorize others to telecast any of the eighty-one (81) motion pictures (listed in

Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, on either a sustaining basis or a commercially sponsored basis, (except only to advertise the defendant Republic Productions, Inc., as a producer of motion pictures and any of the motion pictures produced by said defendant under either the 1937 Agreement or the 1948 Agreement) and the Court expressly finds that any such telecast of [104] any of said motion pictures or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, will inflict immediate, substantial and irreparable injury upon plaintiff and will immediately, substantially and irreparably damage all elements of plaintiff's commercial advertising business, and will further inflict immediate, substantial and irreparable injury upon plaintiff in that the value of plaintiff's name, voice or likeness for commercial advertising purposes will immediately be destroyed or substantially damaged and diluted, and that plaintiff's name, reputation and good will, and the public's trust, confidence and admiration for plaintiff will be immediately subjected to jeopardy and irreparable damage and injury in that under defendant's contemplated and threatened course of conduct the plaintiff's name, voice and likeness will be associated with, will be used in connection with, and will be used for the purpose of selling, products and services over the

type, quality and character of which plaintiff will have no control.

(53) One of the principal elements of value to anyone using plaintiff's name, voice or likeness in commercial advertising is the existence of control on the part of the plaintiff over the use of his name, voice or likeness by others whereby a user may be granted the exclusive right to use plaintiff's name, voice or likeness in the particular field or fields of such user. If defendants are permitted to pursue their present course of conduct and to telecast or permit others to telecast any of the motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, for commercial advertising purposes, plaintiff would thereby be deprived of control over the use of his name, voice and likeness in said motion pictures or said scenes or sound tracks therefrom or said portions thereof, for commercial advertising purposes, and would thereby be deprived of his ability to [105] grant exclusivity in any particular field of endeavor to any particular user of his name, voice or likeness for commercial advertising purposes.

(54) It is customary in the radio and television industries for a sponsor to negotiate and contract in advance for programs to be broadcast or telecast over a period of at least thirteen (13) weeks, normally commencing in the Fall of each calendar year. The costs, expenses and commitments which

must be made by a sponsor for both talent and station or network time in connection with commercially sponsored radio or television programs is very substantial and amounts to many thousands of dollars, much of which must normally and necessarily be committed for or expended far in advance of the actual date of broadcasting or telecasting of any given program and such programs by national advertisers may ultimately involve expenditures of several millions of dollars per annum. Pursuant to such custom, from a date prior to September, 1950, until the month of April, 1951, the plaintiff negotiated with his then radio sponsor, The Quaker Oats Company, for a contract or contracts pursuant to which plaintiff would continue to appear on radio for said Company and would also begin appearances on television on behalf of said Company commencing not later than the Fall of 1951. As a result of, among other things, the defendants' threats to telecast or allow others to telecast for commercial advertising purposes certain of the eighty-one (81) motion pictures listed in Exhibits B and D, the said The Quaker Oats Company terminated negotiations for a continuance of the radio program and for the contemplated new television program. Commencing immediately after the discontinuance of said negotiations with The Quaker Oats Company, the plaintiff continuously attempted to negotiate a contract or contracts with various other potential sponsors for his appearance on radio and television programs commencing in the Fall of 1951. As a result of said efforts plain-

tiff did make informal arrangements pursuant to which he commenced a thirteen (13) weeks' [106] radio program on or about October 5, 1951, but plaintiff was unable to arrange for a television program to commence in the Fall of 1951, and was unable to make any arrangements for either radio or television programs which did not contain an option in favor of the sponsor whereby such sponsor could cancel such arrangements in the event that any of the eighty-one (81) motion pictures listed in Exhibits B and D (or any versions thereof modified and shortened so as to be suitable for use on a one hour television program) were telecast on either a sustaining or commercially sponsored basis. The claims and threats of the defendants, of which The Quaker Oats Company had knowledge shortly after they were first made in February, 1950, were in fact a substantial and contributing cause of the termination of the negotiations between plaintiff and The Quaker Oats Company and interfered with and delayed plaintiff in making arrangements with said sponsor or others for radio or television appearances. The said claims and threats of the defendants have substantially interfered with and damaged plaintiff and the plaintiff has actually incurred substantial monetary damages as a proximate result of said claims and threats of defendants, but it is impossible upon the evidence adduced at the trial to ascertain the specific amount of monetary damages suffered by plaintiff.

(55) Defendants' present course of conduct and their claim to the absolute and unrestricted right to use and to authorize others to use for commercial advertising purposes any or all of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff appears or is used, and the claim of said defendants to the right to receive and retain substantial monetary consideration for such use now constitute and if permitted to continue will constitute unjust and unfair competition with the plaintiff and now constitute and will constitute a wrongful interference with and a violation of plaintiff's long acknowledged and [107] well established right freely and exclusively to engage in the business of using and of authorizing others to use his name, voice and likeness for commercial advertising purposes.

(56) Any allegations in the Answer of defendants which are in any way contrary to or in conflict with any of the foregoing Findings of Fact are and each of them is hereby found to be untrue.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

(1) The Court concludes in all respects as set forth in the foregoing Findings of Fact, and any Conclusion of Law that is contained therein is hereby expressly incorporated in these Conclusions

of Law with the same force and effect as though expressly set forth herein.

(2) This Court has jurisdiction of the cause pursuant to Section 1332 of Title 28 of the United States Code.

(3) As against the defendants in this action and anyone claiming through or under them, or any of them, the plaintiff is the sole and exclusive owner of his name "Roy Rogers" and his voice and likeness and of the name and likeness of his horse "Trigger" for any and all commercial advertising purposes whatsoever and none of the defendants has any right to use plaintiff's name, voice or likeness or the name or likeness of his horse Trigger (whether in still photographs or in motion pictures or otherwise or at all) for any commercial advertising purpose or purposes whatsoever.

(4) The defendants and each of them are estopped to use or authorize others to use plaintiff's name, voice or likeness or the name or likeness of his horse Trigger (whether in still photographs or in motion pictures or otherwise or at all) for any commercial advertising purpose or purposes whatsoever. [108]

(5) The defendants and each of them have waived any right which they or any of them might ever have had or claimed to have had to use or authorize others to use plaintiff's name, voice or likeness or the name or likeness of his horse Trigger (whether in still photographs or in motion pictures

or otherwise or at all) for any commercial advertising purpose or purposes whatsoever.

(6) Such limited commercial advertising rights as were granted by the plaintiff to the defendant Republic Productions, Inc., expired upon the termination of the 1948 Agreement on or about May 27, 1951, and neither the provisions of the 1937 Agreement nor the provisions of the 1948 Agreement granted to the defendants or any of them any right whatsoever from and after May 27, 1951, to use or authorize others to use plaintiff's name, voice or likeness or the name or likeness of his horse Trigger (whether in still photographs or in motion pictures or otherwise or at all) for any commercial advertising purpose or purposes whatsoever.

(7) The telecasting or broadcasting of any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff or of his horse Trigger appears or is used, on either a sustaining basis or commercially sponsored basis, or any other use of plaintiff's name, voice or likeness or the name or likeness of his horse Trigger (whether in still photographs or in motion pictures or otherwise or at all) in any other advertising medium or media, for any commercial advertising purpose or purposes whatsoever would constitute unfair competition with the plaintiff.

(8) Immediate, substantial and irreparable damage and injury will be inflicted upon the plaintiff if defendants are permitted to telecast or broadcast or authorize others to telecast or broadcast any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other [109] portion thereof in which the name, voice or likeness of plaintiff or of his horse Trigger appears or is used, on either a sustaining basis or commercially sponsored basis, or use or authorize others to use plaintiff's name, voice or likeness or the name or likeness of his horse Trigger (whether in still photographs or in motion pictures or otherwise or at all) in any other advertising medium or media, for any commercial advertising purpose or purposes whatsoever.

(9) Plaintiff has actually incurred substantial monetary damages as a proximate result of the claims, threats, acts and conduct of defendants but the amount thereof cannot be ascertained from the evidence adduced at the trial, and plaintiff is therefore not entitled to a judgment for money damages.

(10) Plaintiff has no plain, speedy or adequate remedy at law.

(11) Plaintiff is entitled to a permanent injunction against defendants and each of them, and their respective officers, agents, servants, employees, attorneys and all persons in active concert or participation with them or any of them, enjoining and restraining them, and each of them, from in any manner using, exhibiting, telecasting, broadcasting,

leasing, selling, licensing or disposing of or authorizing any other or others in any manner to use, exhibit, telecast, broadcast, lease, sell, license or dispose of, for any commercial advertising purpose or purposes whatsoever, the name, voice or likeness of the plaintiff Roy Rogers or the name or likeness of plaintiff's horse Trigger (whether in still photographs or in motion pictures or otherwise or at all) in or on any advertising medium or media whatsoever, including but without in any way limiting the generality of the foregoing, any use, exhibition, telecast (on either a sustaining basis or a commercially sponsored basis), broadcast (on either a sustaining basis or a commercially sponsored basis), lease, sale, license or disposition, for any commercial advertising purpose or purposes whatsoever of [110] any of the eighty-one (81) motion pictures (listed in Exhibits B and D) or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff or of his horse Trigger appears or is used.

(12) Plaintiff is entitled to an order forever releasing and exonerating plaintiff and his surety (National Surety Corporation, a New York Corporation) and each of them, from that certain "Undertaking on Temporary Restraining Order and Preliminary Injunction" filed herein on June 23, 1951, and that certain "Additional Undertaking on Preliminary Injunction" filed herein on July 25, 1951, and from each of said Undertakings.

(13) Plaintiff is entitled to recover his costs herein incurred.

Let Judgment Be Entered Accordingly.

Dated this 26th day of January, 1952.

/s/ PEIRSON M. HALL,

Judge, United States District Court.

Presented and Approved:

GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
SAMUEL O. PRUITT, JR.,
RICHARD H. WOLFORD,
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff.

Receipt of copy of the foregoing is hereby acknowledged, January 23, 1952:

FRANK B. BELCHER,
LOEB & LOEB,
HERMAN F. SELVIN,
HARRY L. GERSHON,

By /s/ HARRY L. GERSHON,

Attorneys for Defendants, Republic Productions, Inc., Republic Pictures Corporation, and Hollywood Television Service, Inc. [111]

EXHIBIT A

[Exhibit A attached is identical to Exhibit A attached to the Answer of Defendant and is set out in full at pages 25 to 46 of this printed record.]

FHS:tlb 12-11-51

EXHIBIT B

Titles and Dates of Completion of Photography of Motion Pictures Starring Roy Rogers, Produced During Term of 1937 Agreement

Title	Date of Completion
Under Western Stars	March 29, 1938
Billy the Kid Returns	August 8, 1938
Come on Ranger	October 20, 1938
Shine On Harvest Moon	November 16, 1938
Rough Riders Patrol	January 28, 1939
Frontier Pony Express	March 3, 1939
Southward Ho	April 12, 1939
In Old Caliente	May 13, 1939
Wall Street Cowboy	August 1, 1939
The Arizona Kid	August 25, 1939
Saga of Death Valley	October 13, 1939
Days of Jesse James	November 16, 1939
Young Buffalo Bill	March 9, 1940
Carson City Kid	May 16, 1940
Ranger and the Lady	June 14, 1940
Colorado	July 27, 1940
Bad Men of Deadwood	July 31, 1940
Young Bill Hickok	August 27, 1940
The Border Legion	October 17, 1940

Robin Hood of the Pecos .....November 25, 1940
In Old Cheyenne .....February 25, 1941
Sheriff of Tombstone .....April 5, 1941
Nevada City .....May 6, 1941
Jesse James at Bay .....September 9, 1941
Red River Valley .....November 5, 1941
Man From Cheyenne .....December 4, 1941
South of Sante Fe .....January 3, 1942
Sunset on the Desert .....February 21, 1942
Romance on the Range .....April 18, 1942
Sons of the Pioneers .....May 27, 1942
Sunset Serenade .....July 25, 1942
Heart of the Golden West .....September 19, 1942
Ridin' Down the Canyon .....October 4, 1942
Idaho .....December 31, 1942
King of the Cowboys .....February 4, 1943
Song of Texas .....April 12, 1943
Silver Spurs .....May 15, 1943
Man from Music Mountain .....July 6, 1943
Hands Across the Border .....September 21, 1943
Cowboy and the Senorita .....January 26, 1944
Yellow Rose of Texas .....March 10, 1944
Song of Nevada .....April 2, 1944
San Fernando Valley .....June 22, 1944
Lights of Old Sante Fe .....July 31, 1944
Utah .....December 22, 1944
Bells of Rosarita .....February 9, 1945
Man from Oklahoma .....March 29, 1945
Sunset in El Dorado .....June 28, 1945
Don't Fence Me In .....August 6, 1945
Along the Navajo Trail .....September 6, 1945
Song of Arizona .....December 22, 1945

Rainbow Over Texas .....January 29, 1946
My Pal Trigger .....March 16, 1946
Under Nevada Skies .....April 17, 1946
Roll On Texas Moon .....May 17, 1946
Home in Oklahoma .....July 3, 1946
Helldorado .....July 25, 1946
Apache Rose .....September 27, 1946
Bells of San Angelo .....January 20, 1947
Springtime in the Sierras .....March 19, 1947
On the Old Spanish Trail .....June 11, 1947
Gay Ranchero .....August 20, 1947
Under California Stars .....December 15, 1947

EXHIBIT C

[Exhibit C attached is identical to Exhibit D attached to the Answer of Defendant and is set out in full at pages 55 to 109 of this printed record.]

FHS:tlb 12-11-51

EXHIBIT D

Titles and Dates of Completion of Photography of Motion Pictures Starring Roy Rogers, Produced During Term of 1948 Agreement

Title	Date of Completion
Eyes of Texas	April 17, 1948
Nighttime in Nevada	May 15, 1948
Grand Canyon Trail	July 2, 1948
The Far Frontier	August 16, 1948
Susanna Pass	February 4, 1949
Down Dakota Way	April 4, 1949

The Golden Stallion .....May 24, 1949
Bells of Coronado .....August 19, 1949
Twilight in the Sierras .....October 18, 1949
Sunset in the West .....April 5, 1950
North of the Great Divide .....May 20, 1950
Trail of Robin Hood .....July 12, 1950
Spoilers of the Plains .....August 29, 1950
Heart of the Rockies .....October 25, 1950
Trigger, Jr. .....December 19, 1950
In Old Amarillo .....January 24, 1951
South of Caliente .....March 22, 1951
Pals of the Golden West .....May 23, 1951

Receipt of copy acknowledged.

[Endorsed]: January 26, 1952. [164]

United States District Court, Southern District of California, Central Division

No. 13220-PH

ROY ROGERS,

Plaintiff,

vs.

REPUBLIC PRODUCTIONS, INC., et al.,

Defendants.

JUDGMENT FOR PLAINTIFF
(Permanent Injunction)

The above-entitled cause having duly come on for trial on Thursday the 13th day of September, 1951, at the hour of 10:00 o'clock a.m. before the Honor-

able Peirson M. Hall, Judge Presiding, Frederic H. Sturdy, Esq., Samuel O. Pruitt, Jr., Esq., and Richard H. Wolford, Esq., of Gibson, Dunn & Crutcher, appearing as counsel for plaintiff, and Herman F. Selvin, Esq., and Harry L. Gershon, Esq., of Loeb and Loeb, and Frank B. Belcher, Esq., of Jennings & Belcher, appearing as counsel for defendants, and the trial having been concluded on Friday, October 12, 1951, and oral argument by counsel for the respective parties having been concluded on Wednesday, October 17, 1951, and the cause having been submitted to the Court on the latter date, and the Court having heard and considered the evidence both oral and documentary offered by the respective parties, and the Court, in open court, having orally announced its decision in [165] favor of the plaintiff on October 18, 1951, and being fully advised in the premises, the Court having made and filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment in favor of the plaintiff be entered in accordance therewith,

Now Therefore, by reason of the premises and Findings aforesaid and of the law,

It Is Hereby Ordered, Adjudged and Decreed:

1. That the defendant Republic Productions, Inc., the defendant Republic Pictures Corporation, and the defendant Hollywood Television Service, Inc., and each of them, and their respective officers, agents, servants, employees, attorneys and all persons in active concert or participation with them or any of them be and they are hereby permanently

enjoined and restrained from in any manner using, exhibiting, telecasting, broadcasting, leasing, selling, licensing or disposing of or authorizing any other or others in any manner to use, exhibit, telecast, broadcast, lease, sell, license, or dispose of, for any commercial advertising purpose or purposes whatsoever (as said term "commercial advertising purpose" is defined in the Findings of Fact herein) the name, voice or likeness of the plaintiff Roy Rogers or the name or likeness of plaintiff's horse Trigger (whether in still photographs or in motion pictures or otherwise or at all) in or on any advertising medium or media whatsoever, including but without in any way limiting the generality of the foregoing, any use, exhibition, telecast (on either a sustaining basis or a commercially sponsored basis), broadcast (on either a sustaining basis or a commercially sponsored basis), lease, sale, license or disposition, for any commercial advertising purpose or purposes whatsoever (as said term "commercial advertising purpose" is defined in the Findings of Fact herein) of any of the following eighty-one (81) motion pictures heretofore produced by defendant [166] Republic Productions, Inc., or any scene or sound track therefrom or any other portion thereof in which the name, voice or likeness of plaintiff or the name or likeness of plaintiff's horse Trigger appears or is used:

Title	Date of Completion
(1) Under Western Stars	March 29, 1938
(2) Billy The Kid Returns	August 8, 1938

(3)	Come on Ranger	October 20, 1938
(4)	Shine on Harvest Moon	November 16, 1938
(5)	Rough Riders Patrol	January 28, 1939
(6)	Frontier Pony Express	March 3, 1939
(7)	Southward Ho	April 12, 1939
(8)	In Old Caliente	May 13, 1939
(9)	Wall Street Cowboy	August 1, 1939
(10)	The Arizona Kid	August 25, 1939
(11)	Saga of Death Valley	October 13, 1939
(12)	Days of Jesse James	November 16, 1939
(13)	Young Buffalo Bill	March 9, 1940
(14)	Carson City Kid	May 16, 1940
(15)	Ranger and the Lady	June 14, 1940
(16)	Colorado	July 27, 1940
(17)	Bad Men of Deadwood	July 31, 1940
(18)	Young Bill Hickok	August 27, 1940
(19)	The Border Legion	October 17, 1940
(20)	Robin Hood of the Pecos	November 25, 1940
(21)	In Old Cheyenne	February 25, 1941
(22)	Sheriff of Tombstone	April 5, 1941
(23)	Nevada City	May 6, 1941
(24)	Jesse James at Bay	September 9, 1941
(25)	Red River Valley	November 5, 1941
(26)	Man From Cheyenne	December 4, 1941
(27)	South of Santa Fe	January 3, 1942
(28)	Sunset on the Desert	February 21, 1942
(29)	Romance on the Range	April 18, 1942
(30)	Sons of the Pioneers	May 27, 1942
(31)	Sunset Serenade	July 25, 1942
(32)	Heart of the Golden West	Sept. 19, 1942
(33)	Ridin' Down the Canyon	October 4, 1942
(34)	Idaho	December 31, 1942

(35) King of the Cowboys .....February 4, 1943
(36) Song of Texas .....April 12, 1943
(37) Silver Spurs .....May 15, 1943
(38) Man from Music Mountain ....July 6, 1943
(39) Hands Across the Border ....Sept. 21, 1943
(40) Cowboy and the Senorita ...January 26, 1944
(41) Yellow Rose of Texas .....March 10, 1944
(42) Song of Nevada .....April 2, 1944
(43) San Fernando Valley .....June 22, 1944
(44) Lights of Old Sante Fe .....July 31, 1944
(45) Utah .....December 22, 1944
(46) Bells of Rosarita .....February 9, 1945
(47) Man From Oklahoma .....March 29, 1945
(48) Sunset in El Dorado .....June 28, 1945
(49) Don't Fence Me In .....August 6, 1945
(50) Along the Navajo Trail ..September 6, 1945
(51) Song of Arizona .....December 22, 1945
(52) Rainbow Over Texas .....January 29, 1946
(53) My Pal Trigger .....March 16, 1946
(54) Under Nevada Skies .....April 17, 1946
(55) Roll On Texas Moon .....May 17, 1946
(56) Home in Oklahoma .....July 3, 1946
(57) Helldorado .....July 25, 1946
(58) Apache Rose .....September 27, 1946
(59) Bells of San Angelo .....January 20, 1947
(60) Springtime in the Sierras ....March 19, 1947
(61) On the Old Spanish Trail .....June 11, 1947
(62) Gay Ranchero .....August 20, 1947
(63) Under California Stars ..December 15, 1947
(64) Eyes of Texas .....April 17, 1948
(65) Nighttime in Nevada .....May 15, 1948
(66) Grand Canyon Trail .....July 2, 1948

(67) The Far Frontier .....August 16, 1948
(68) Susanna Pass .....February 4, 1949
(69) Down Dakota Way .....April 4, 1949
(70) The Golden Stallion .....May 24, 1949
(71) Bells of Coronado .....August 19, 1949
(72) Twilight in the Sierras .....October 18, 1949
(73) Sunset in the West .....April 4, 1950
(74) North of the Great Divide .....May 20, 1950
(75) Trail of Robin Hood .....July 12, 1950
(76) Spoilers of the Plains .....August 29, 1950
(77) Heart of the Rockies .....October 25, 1950
(78) Trigger, Jr. .....December 19, 1950
(79) In Old Amarillo .....January 24, 1951
(80) South of Caliente .....March 22, 1951
(81) Pals of the Golden West .....May 23, 1951

2. That the plaintiff and his surety (National Surety Corporation, a New York Corporation) and each of them, be and they, and each of them, are hereby forever released and exonerated from that certain "Undertaking on Temporary Restraining Order and Preliminary Injunction," filed herein on June 23, 1951, and that certain "Additional Undertaking on Preliminary Injunction" filed herein on July 25, 1951, and from each of said Undertakings.

3. That the plaintiff have and recover from the defendants Republic Productions, Inc., Republic Pictures Corporation, and Hollywood Television

Service, Inc., and each of them, their costs, taxed herein in the sum of $1,927.16. [169]

Dated this 26th day of January, 1952, 10:45 a.m.

/s/ PEIRSON M. HALL,
Judge, United States District Court.

Presented and Approved:

GIBSON, DUNN &
CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
SAMUEL O. PRUITT, JR.,
RICHARD H. WOLFORD,
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff.

Receipt of a copy of the foregoing is hereby acknowledged, January 23, 1952.

FRANK B. BELCHER,
LOEB AND LOEB,
HERMAN F. SELVIN,
HARRY L. GERSHON,
By /s/ HARRY L. GERSHON,

Attorneys for Defendants, Republic Productions, Inc., Republic Pictures Corporation, Hollywood Television Service, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed January 26, 1952.

Docketed and entered January 26, 1952. [170]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Plaintiff Above-Named and to His Attorneys of Record:

You and each of you will please take notice that defendants Republic Pictures Corporation, Republic Productions, Inc., and Hollywood Television Service, Inc., hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment for plaintiff heretofore docketed and entered on January 26, 1952, and each parts thereof, except that defendants do not appeal from said judgment to the extent that same does not award plaintiff a judgment for monetary damages.

Dated February 25, 1952.

FRANK B. BELCHER, and
LOEB AND LOEB,
By /s/ HARRY L. GERSHON,
Attorneys for Defendants and Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 25, 1952. [171]

In the United States District Court, Southern District of California, Central Division

No. 13220-PH Civil

ROY ROGERS,

Plaintiff,

vs.

REPUBLIC PRODUCTIONS, INC., a New York Corporation; HOLLYWOOD TELEVISION SERVICE, INC., a Delaware Corporation, et al.,

Defendants.

Honorable Peirson M. Hall, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS
September 13, 1951

Appearances:

For the Plaintiff:

GIBSON, DUNN & CRUTCHER,
634 South Spring Street,
Los Angeles 14, California; by

FREDERIC H. STURDY, ESQ., and
RICHARD H. WOLFORD, ESQ., and
SAMUEL O. PRUITT, JR., ESQ.

For the Defendants:

LOEB and LOEB,
523 West Sixth Street,
Los Angeles 14, California; by

HERMAN F. SELVIN, ESQ., and
HARRY L. GERSHON, ESQ., and
FRANK B. BELCHER, ESQ.,
818 Security Building,
Los Angeles 13, California.

* * *

Proceed. I did not have a chance to read your pretrial memorandums as thoroughly as I would have liked to have done, but I have glanced through them and have a general notion of what the lawsuit is about.

Mr. Sturdy: I was going to say, your Honor, that this matter was argued rather extensively at the time of the hearing on the preliminary injunction, and I had been assuming that the court knew in general what the lawsuit was about.

However, I would like to very briefly outline some of what we believe to be the main facts.

The Court: In the reexamination of the pleadings yesterday, your position is, first, that there is a violation of the contracts on the part of the defendant?

Mr. Sturdy: Well, I think you could put it that way or, [6*] putting it the other way, I would say that the contracts do not give them the right, if that is a violation of the contract, because it doesn't

* Page numbering appearing at top of page of original Reporter's Transcript.

give them the right they claim under, so I suppose technically it is a violation.

The Court: Then I was wondering whether or not you were attempting to state a separate cause of action for unfair competition by your allegations in Paragraph 18.

Mr. Sturdy: Yes, I was, your Honor, and I was going to mention that.

The Court: Why did you not set it up as a separate cause of action then?

Mr. Sturdy: Well, frankly, your Honor, in the Federal practice I personally, in order to simplify the pleadings, have normally set up a single claim. I have always understood that unless somebody objected to that, that that was an appropriate pleading because so often the same facts that give rise to one cause of action will give rise to another one. And we all know in the state courts we re-plead nine-tenths of the first cause of action and generally add one or two paragraphs.

The Court: You also have a third one here, waiver, if there is any right; and the fourth one is estoppel.

Mr. Sturdy: That is correct, your Honor.

I think again, as practicing attorneys, we realize that very often the same facts that would indicate a waiver will [7] give rise to an estoppel. It is merely a different legal conclusion, because we do rely on conduct to a great extent in this waiver and estoppel theory. [8]

The Court: Well, I just wanted to see whether

or not you were attempting to state one cause of action or four.

Of course, I am a little old-fashioned; I don't believe in Professor Clark's theory that it simplifies pleadings to throw everything in one basket and compel the Judge and everybody else to try to figure out why you think you are entitled to relief.

Mr. Sturdy: I am sorry, your Honor.

The Court: Nobody has made any exception to it, and I wanted you to clarify your position with respect to it.

Mr. Sturdy: Yes. I felt there was a single claim for relief based on these four different theories.

In all of these claims, your Honor, the basic basis of all of them is what we believe to be the fundamental right of anyone in his name and likeness—if you were a private citizen we call it a right of privacy, and courts prevent people from using it, and when a person is a public figure they say it is a property right because public figures are able to license or sell their name for commercial purposes, and then the courts protect it as a property right. But that is the fundamental decision here, as to whether we granted the right to the defendants to use this public figure's name and likeness in the manner in which they desire to use it, or did we not so grant it.

Briefly, your Honor, the evidence will go back to 1937, [9] when there was an original contract signed October 13, 1937. I believe the Court has seen that before; it is in the pleadings.

The Court: Yes.

Mr. Sturdy: There is no question about it, but we will put an additional copy in for the convenience of the Court so you don't have to thumb through the pleadings. That contract with amendments ran until—there were disputes in the middle of it, but at least it ran until the second contract, February 28, 1948, and we will put that contract in evidence. There is no question about the validity of that. Actually there are the rights, I believe—to be fair to all parties, all parties would agree that the rights of the parties under each of those contracts are separate. In other words, it is possible that under one contract you would find that they could do this, whereas with respect to the pictures made under the other you would find that they couldn't do so. With the single possibility that this course of conduct and the waiver and estoppel theory, I think, would cover both.

The Court: Your position as to the first contract was that on the face of the contract it granted the defendants here the right to use his name and likeness for commercial purposes during the term of the contract only?

Mr. Sturdy: That is correct, your Honor, and therefore [10] that the term having expired, under almost an axiom, that the right terminated.

It is as though you make a lease of your property from now to January 1st; it stops January 1st, and after that you don't have a lease.

We make the same claim, your Honor, under the second contract, although the second contract, it is

true, has a few more frills in it, because there the parties had had some experience with this advertising business and they carved out certain rights which they thought the parties should have, and the right which we thought that Republic should have is contained in 4-B. There are four or five subparagraphs of paragraph 4.

The Court: Your position as to that contract is, likewise, that any right to use it commercially expired——

Mr. Sturdy: That is correct.

The Court: ——at the end of the contract, if I understand the contentions of your brief correctly.

Mr. Sturdy: That is correct.

The Court: Then the lawsuit does not involve a right of the defendants to use these pictures on television, except under commercial sponsorship?

Mr. Sturdy: Yes, your Honor, unless, as I say, I feel that a sustaining program, I feel even a so-called sustaining program, and that is just a term, is in effect a commercial [11] project, because it advertises the station, and the purpose of a sustaining program is to gather people, gather the listening public——

The Court: By a sustaining program, you mean a program paid for by the television station?

Mr. Sturdy: Yes, your Honor.

The Court: There is not involved in this lawsuit the right of Republic to put these pictures on television and advertise Republic?

Mr. Sturdy: That is correct, and Rogers pictures.

I can visualize, your Honor, and I have wondered why the motion picture industry didn't do it, instead of crying about television they should have television for an advertising media to get people to go to the theatres. I think they could do a beautiful job of it.

The Court: That isn't up to me to decide.

Mr. Sturdy: I know. But the Court has hit upon a right which I think they not only have, but it is a valuable right; that is the point I was making. It is not just a theoretical right.

The Court: In other words, you concede they have that right?

Mr. Sturdy: I would concede that they could put these pictures on for a "See Roy Rogers pictures week," or "Go to the theatre once a week and see Republic stars." [12]

Technically the contract says only Rogers pictures.

I feel that would be within the spirit of the contract. And I feel that they could also T. V. these into theatres.

For example, the Court may have read the Times this morning. There is a headline on it that there was a riot, there were so many people trying to get into theatres to see the prize fight last night.

There is no reason why they shouldn't use the medium of televising to televise these into theatres to get away from the mechanical problems of chasing the reels around to various theatres and having operators to operate them.

The Court: Your point is, you concede the defendants have that right?

Mr. Sturdy: That is correct, your Honor.

The Court: So long as they do not commercially sponsor or have somebody commercially sponsor it?

Mr. Sturdy: That is basically our contention. It really hasn't anything to do with television. The thing we are objecting to is what we believe to be a use of his name for advertising purposes. And we don't feel they could do it on radio or billboards or newspapers or television or anywhere else. Those are all advertising media. [13]

* * *

The Court: Do you wish to make a statement at this time, Mr. Selvin?

Mr. Selvin: I would like to make a brief one, your Honor.

Our fundamental position is that under this contract, or in the absence of any provisions in the contract, Republic became and is the owner of all of these pictures, with all of the rights incident to absolute and unlimited ownership. That being such, it is incumbent upon the plaintiff to point to some provision of the contracts, express or implied, which in some way cuts down or limits that ownership.

We say with respect to the provisions on which they rely, the so-called commercial tie-up provisions in the contract, Paragraph 4 of the 1948 contract, we say that with respect to those provisions they a subject entirely separate and distinct from the subject dealt with in what we have called in our memorandums the all-rights or exhibition clause.

One deals with Rogers' appearance as an integral part of a motion picture, which is a definite, tan-

gible thing, and as to which apparently our unincumbered title is conceded. The other, commercial advertising clause, deals with the right of the parties to make use of Roy Rogers' name and likeness outside of the picture for various commercial purposes.

Now we concede that as to those uses, those outside uses, uses not connected with the exhibition of the picture, [17] our rights, whatever they were, terminated with the termination of the contract except in one particular, the contract gives us the perpetual right to use Roy Rogers' name and likeness for the purpose of advertising the pictures which we own.

So we say that on a construction of the contract there is to be found no curtailment, no cutting down of our unlimited and absolute ownership. If there can be any doubt of that, if the contract needs interpretation or construction, or in order to negate the implication of the covenant which Mr. Sturdy seeks to imply, although he hasn't mentioned it in his opening statement, if in order to negate that it becomes necessary, we are prepared to produce and will offer evidence relating to the negotiation of these contracts, the statements and discussions of the parties, to the end of showing that it was made clear and acquiesced in by Rogers that under these contracts Republic wanted and was to get unqualified television rights. I think that is the term that was actually used in the discussions, as the evidence will show.

Our evidence will further show——

The Court: That evidence will be along the lines of the affidavits which you filed before, on commercial advertising?

Mr. Selvin: Affidavits relating to the meaning of the commercial tie-up. There will be evidence of that, and of the place and significance of the term commercial advertising in the industry. [18]

But beyond that, we will offer evidence of the actual negotiations of the parties, by the people who participated in those negotiations, backed up by the various memorandums and notes which they made and took at the time of the discussions. And from that evidence we propose to show to your Honor that there could be no doubt that not only was it not the intention of the parties in any way to limit Republic's rights to use these pictures on television, but that it was affirmatively maintained by Republic's representatives and acquiesced in by Rogers' representatives that they should have the right to televise these pictures if they so desired.

Our evidence will further show that after that contract was executed and the parties, that is, the 1948 contract, because it was from about 1947 on that television saw its big expansion, although it was in existence and a potential thing, at any rate, as early as the first contract, since the first contract expressly refers to it in language; our evidence will also show that as the parties performed under these contracts Mr. Rogers and his representatives who were by those contracts prohibited from appearing on television in person or making

motion pictures for television by any other producer, recognized that the term "television" as used in the contract included commercial or sponsored programs as well as all other kinds, because whenever they wanted Roy Rogers to appear on a commercial television program they requested Republic's [19] permission and if that permission was not obtained they did not appear, except in one instance, which was explained as an oversight or a mistake or an impulsive act on the part of Roy Rogers, and as to which, as a matter of fact, Republic consented before the appearance because there had been a newspaper announcement of it.

So we will show by the construction of the contract these parties made no distinction between sponsored and non-sponsored commercial or non-commercial television as those terms were used in the contracts. [20]

* * *

Mr. Selvin: * * * But our point is that on the interpretation of the contract, what the big question in this case is going to be, is what did the parties mean when in the contract they defined the photoplays to which Republic was given, if it didn't have, complete and unincumbered title—what did they mean in defining the photoplays when they said that a photoplay includes any motion picture produced or designed—this is not [21] the exact language, but the substance of it—for transmission or exhibition by any method now or hereafter known, including among others television devices.

Now what did they mean by that? We say that they meant by the use of the word "television" in

that provision of the contract exactly what they meant in the provision of the contract which says that during the term of the contract Roy Rogers shall not appear in television, and since Roy Rogers by his conduct demonstrated that he considered that prohibition against television appearance to include commercial as well as non-commercial television, then we say when the same word was used in the definition of photoplay and the granting of rights to Republic, it also included commercial as well as non-commercial television, and that therefore our rights under the contract to exhibit these pictures by commercial as well as non-commercial television is exclusively established. [22]

* * *

Mr. Selvin: To sum it up in a sentence, if I may: What Mr. Rogers is trying to do here is to apply to property which we admittedly own unconditionally and absolutely, restrictions in the contract which relate to a different species of property which he owns, namely, the right to use his name and likeness outside of these pictures.

Now, once we see that basic distinction between these two clauses, I think it follows necessarily and logically that the one, that is, the commercial tie-up clause, is no limitation whatever on the exhibition or ownership clause. [26] And if, as I said before, if there is the slightest doubt about that, the evidence which we are prepared to offer, and which we will offer, as to the negotiations and discussions of the parties in entering into this contract, at least in the '48 contract, will prove conclusively

that it never contemplated any limitation of the sort now urged upon Republic's ownership rights.

I have already referred to some of the evidence of practical construction which we propose to offer. We will offer some additional evidence. We will show that on several occasions after the 1948 contract was executed the possibility that Republic would put these pictures on television was brought home to Rogers and his representatives, and that it was not until the very late stages of his contract, after negotiations for a new deal had failed, or had looked as though they were going to fail, that it was ever suggested by Rogers or any of his representatives that there was any limitation whatever on Republic's right to put these pictures on television of any kind.

We will show and we will contend from the evidence that the necessary inference is that the parties never intended at the time they entered into these contracts to put any limitation on, and that the contention now made that there is a limitation is an afterthought induced by the necessities of the negotiations that were going on for a new deal, and for [27] permission to Roy Rogers to appear on a television program, a continuous television program; and when those negotiations failed, or it looked as though they were going to fail, then and then for the first time it occurred to Rogers and his representatives that in this contract there was some limitation on our right to televise these [28] pictures.

* * *

Mr. Selvin: I have one more brief statement

and then I am through. I say the significance of this evidence, not only of the discussions in negotiations, but of the conduct and practice of the parties after the contract had been executed, is this: You will have to read into this contract, in order to sustain the plaintiff's position, we submit, you will have to read into it a covenant that is not there in express words, you will have to imply a covenant a prohibition against our use of these pictures or commercial television into that agreement.

Now, a covenant cannot be implied against the expressed intention of the parties, and if the parties at the time they executed this contract had no intention to prohibit, and we think the evidence that they didn't think they had any such right or didn't urge any such right until late in the term of the contract will justify and compel that inference, if they had no such intention then no implication of the sort Mr. Sturdy demands, and which his case requires, can be made. And that, we say, is the significance of the evidence.

I haven't attempted to go into all the details of the evidence, or the various ramifications which it probably will [31] take, but I have tried to indicate in a general way our basic position, and I say to your Honor—I must say one more word with reference to waiver and estoppel. We think that that is a completely irrelevant issue in this case. The only effect, assuming that Mr. Sturdy proves up to the hilt on his allegations in his complaint with respect to waiver and estoppel, the only effect that evidence would have would be to show that

Republic does not now have the right, that it is estopped to complain about Roy Rogers' commercial tie-up activities under the '37 contract, which in language gave him no commercial tie-up rights without our consent. So if this were a lawsuit where we were claiming a breach of contract on his part because he made commercial tie-ups without our consent, or if we were claiming some interest in the proceeds of those commercial tie-ups, waiver and estoppel might have some relevancy.

But since we are not concerned with that—we don't deny for a moment whatever Rogers did in respect of commercial tie-ups was his, we make no claim to it, we make no claim to breach of contract, we don't want the proceeds——

The Court: And that it was consented to?

Mr. Selvin: And it was undoubtedly acquiesced in, let me put it that way. In a great many instances there was express consent. [32]

The Court: That was under the '37 contract?

Mr. Selvin: Under the '37 contract, yes.

The Court: Although the face of the contract gave that right to Republic?

Mr. Selvin: We have the right to control the commercial tie-ups, yes.

We say all that amounts to is that if we were not now taking the position which we are taking with respect to that situation, Mr. Sturdy could then, and perhaps with justice, say that we are estopped from claiming any violation or breach on Mr. Rogers' part in that respect.

But that is not an issue here. So waiver and estoppel is beside the point.

So is unfair competition, your Honor, because the whole basis of the claim of unfair competition in this case, as Mr. Sturdy's memorandums will show at length, is the assumption—and I might add the question-begging assumption—that Roy Rogers has never consented to the use of his name and likeness in motion pictures to be televised on commercial programs. That is the whole question, did the rights that we got in these pictures include or did it not include commercial television?

If the answer, as we contend, is that it did include commercial television, then there is Mr. Rogers' consent, because he appeared in the pictures, he signed a contract [33] agreeing to appear, he said in that contract that we had all rights in and to the fruits of his services and to his poses and acts and appearances, and the rights to reproduce them, exhibit them, and transmit them by any devices then or thereafter known, including television devices. So the question of unfair competition drops out of the case.

If your Honor determines that the right which we have in these pictures does not include the right to use them on commercial television, Mr. Sturdy doesn't have to rely on unfair competition.

On the other hand, if your Honor determines that the right in these pictures does include the right to show them on commercial television, then unfair competition is immaterial, because we then have Mr. Rogers' contractual consent to the use of his name and likeness in that fashion.

The Court: Very well. Call your witness.

Mr. Sturdy: I was going to make one remark, if I could, your Honor, very briefly, and that is that we do not agree at all as to these statements made as to the prior negotiations.

Also, we had understood that this 36-page contract that was arrived at after some six months of negotiation was an integrated instrument.

The Court: Was?

Mr. Sturdy: Yes, was and is. But I didn't want to remain [34] silent and agree with the statements which Mr. Selvin made as to what the evidence would be if it became material. We don't believe it is material.

The Court: He said he was going to produce that kind of evidence. You can produce your kind of evidence, whatever it is. [35]

* * *

ROY ROGERS

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Roy Rogers.

The Clerk: And your address?

The Witness: 5330 Amastoy Avenue, Encino, California.

(Conference between the court and the clerk.)

The Court: The Clerk just called my attention to the fact that there were Exhibits 1 to 16 offered for identification on the other hearing. They may

(Testimony of Roy Rogers.)

be marked for identification in this hearing with the same numbers.

Mr. Sturdy: Very well. Thank you, your Honor.

It may be that we will either want to offer those or additional ones, but I will try not to encumber the record.

The Court: They will take the same marking for identification purposes at this time.

(The exhibits referred to were marked for identification Plaintiff's Exhibits 1 to 16, inclusive.)

Direct Examination

By Mr. Sturdy:

Q. Mr. Rogers, will you tell us a little bit about your early training or experience in the entertainment field, [36] please?

A. Well, I was born in Ohio, and raised on a farm out of Portsmouth until I was 17, which during that time, since I was about eight or nine years old, my father and mother played the mandolin-guitar and that is where I first learned, and we had square dances on Saturday nights at different neighbors' houses, sometimes at our house, and I learned to call square dances and play the mandolin-guitar at that time.

I got through two years of high school and had to quit to go to work, and I went to Cincinnati, got me a job in a shoe factory, and went to night school there for a year, and I came to California.

(Testimony of Roy Rogers.)

Q. What was that date that you left night school and went to California? A. In 1930.

Q. That was the beginning of the depression, in other words?

A. Yes. I came here in June, 1930, and stayed for four months to visit my sister, and went back to Ohio, and I hitchhiked back out in about a month, and I have been here ever since.

My first job in California was driving a sand and gravel truck, and I went up north and picked peaches for one season, and during that time I tried to get on some of [37] the radio stations where they had different shows, and I went on as a guest and sang and played songs.

In 1931 they had a radio station in Inglewood. They had a program on Saturday night that anybody could get on, so I sang two or three songs and played some on the mandolin-guitar, and a fellow called me up in a couple of weeks—they took my name and address—and asked me if I would join his group, which was the Rocky Mountaineers.

So I joined them, and they had no singers in the group, just mostly instrument players, and then we got Bob Knowland and later on Tim Spencer which formed the trio that you will hear about later.

That group, we played for clubs, Lions Clubs and different kinds of entertainment, and we were on radio station KGER.

After we couldn't make a go of it, we split up and the three of us went with a group called the International Cowboys, which was a group of about

(Testimony of Roy Rogers.)

10 or 11 fellows who were also on the same station only on the downtown remote control station.

We were there for the latter part of '32 and the first part of '33, and there was a fellow selling time on the station who asked us, told us if we would go on the road for him he thought he could make us a pretty good amount of money. So we told him to go ahead, and he started ahead of us and [38] wired us our first date, which was in Yuma, Arizona.

Q. Does that mean personal appearances?

A. Yes, personal appearances.

Our first date was Yuma, Arizona.

The Court: When?

The Witness: This was in '33, 1933, June.

And he stayed ahead of us and we got five out of this group of 10, Tim Spencer, a fellow called "Cyclone," and "Cactus Mac," and "Slumber Nichols," and we played our first date in Yuma, which he had booked at 50 per cent over the average, and we made no money.

We played Miami, Arizona, and the same thing happened. And we did our advertising by writing on the outside of the car, and with a microphone and rode up and down the main streets.

Then we made about $4.00 apiece in Safford, Arizona, and went on to Wilcox, which was the home town of "Cactus Mac." He left us there, said he couldn't take any more of it, and said he was going to stay there at his dad's ranch, and the four of us went on to Roswell, New Mexico, and we got

(Testimony of Roy Rogers.)

on the radio station there and played the theatre and went up to the White Mountains for a celebration, Fourth of July celebration, and played up there, and we played a dance in Roswell and made enough money to get on to Lubbock, Texas.

We got on the radio station there and talked about [39] different appearances we made around in surrounding towns of Lubbock, and we made enough money to get back home, and when I got back I joined a group called the Texas Outlaws on radio station KFWB.

Q. (By Mr. Sturdy): By "home," you mean California? A. Yes.

I got back on KFWB, and then Tim went to work for the Safeway Stores, and the boys all busted up, and after I was on the Texas Outlaw show for a while, I got in touch with Tim and Bob Knowland, the other original part of the trio, and told them the situation, that we were on a good station and we might have a chance if we would get in there and work on it.

So Bob quit his job—he was caddying at the golf course at Bel-Air—and Tim quit his job, and we got us a boarding house up on Carlton Way, and holed up woodshedded songs.

In our next couple of years we learned—none of us read music, but we memorized—about a thousand songs.

Q. What were those years that you are talking about now, Mr. Rogers?

A. That is '34, '35.